NO. 56467-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALEX LOPEZ LEON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan Adams, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Alex Lopez Leon sat silent and terrified in the back seat of a car as Javier Valenzuela Felix—whom Alex had just met hours earlier—executed the front seat passenger and then the driver, both of whom Alex had also met that same night. The prosecution never established a motive. Javier admitted to being the killer and pleaded guilty to both murders. The prosecution nevertheless charged Alex with two counts of first degree premeditated murder.

With no more than speculation regarding Alex's involvement, the prosecution deliberately introduced evidence of Mexican cartels and drug smuggling across the United States-Mexico border, for no apparent purpose except to trigger jurors' prejudices against Latinx individuals and their fears of narcotics trafficking in their own community. This appeal to jurors' potential ethnic biases denied Alex his right to a fair trial. Defense counsel's failure to object to inflammatory and wholly

irrelevant cartel evidence further deprived Alex of his right to effective assistance of counsel.

These errors and others, including the prosecution's fabrication of an agreement between Javier and Alex in rebuttal argument, accumulated to such a degree that there can be no confidence in the outcome of Alex's trial.

B. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to sustain Mr. Lopez Leon's convictions for first and second degree murder.

2. The prosecution engaged in misconduct by repeatedly appealing to jurors' potential ethnic biases against Latinx individuals, denying Mr. Lopez Leon, a Latinx man, his due process right to a fair trial.

3. Defense counsel was constitutionally ineffective for not seeking exclusion of irrelevant and prejudicial evidence of Mexican cartels.

4a. The trial court erred in admitting demeanor evidence related to a fact witness under ER 403.

4b. Defense counsel was constitutionally ineffective for failing to object to the demeanor evidence as an improper opinion on guilt.

5a. The prosecution engaged in misconduct in rebuttal argument by referring to facts not in evidence, depriving Mr. Lopez Leon of a fair trial.

5b. Defense counsel was constitutionally ineffective for failing to make a timely objection to prosecutorial misconduct in rebuttal.

6. The trial court erred in refusing to investigate an allegation of juror misconduct in deliberations.

7. Cumulative error denied Mr. Lopez Leon a fair trial.

8. The trial court erred in failing to recognize its authority to impose concurrent sentences for multiple serious violent offenses.

9. The trial court erroneously ordered Mr. Lopez Leon to pay discretionary community supervision fees.

10. The trial court made a clerical error in the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Must Mr. Lopez Leon's convictions be reversed for insufficient evidence and the charges dismissed with prejudice, where the prosecution's theory of liability amounted to nothing more than speculation based on mere possibilities, which are inadequate as a matter of law to sustain a criminal conviction?

2. Must Mr. Lopez Leon's convictions be reversed, where the prosecution engaged in race-based misconduct by deliberately introducing inflammatory and largely irrelevant evidence of Mexican cartels, illegal drug smuggling, and the supposed characteristics of Hispanic drug dealers, for the apparent purpose of appealing to jurors' ethnic biases and fears regarding Mexican drug trafficking in their own community?

3. Must Mr. Lopez Leon's convictions be reversed, where his attorney was constitutionally ineffective for failing to seek exclusion of highly prejudicial cartel evidence that invited

the jury to speculate about the missing motive and missing connection between Mr. Lopez Leon and the murderer?

4a. Must Mr. Lopez Leon's convictions be reversed, where the trial court erred under ER 403 in admitting unfairly prejudicial evidence of one of the victim's mother's emotional reaction to identifying Alex on surveillance video, which served no purpose except to evoke jurors' sympathies and suggest her opinion on guilt?

4b. Alternatively, must Mr. Lopez Leon's convictions be reversed, where his attorney objected under ER 403 but failed to object to the same evidence as an impermissible opinion on guilt?

5a. Must Mr. Lopez Leon's convictions be reversed, where the prosecution engaged in misconduct in rebuttal argument by fabricating a purported agreement between Mr. Lopez Leon and the murderer, based on no actual evidence, but suggesting the prosecution's personal knowledge of complicity?

5b. Alternatively, must Mr. Lopez Leon's convictions be reversed, where his attorney was constitutionally ineffective for failing to make a timely objection to prosecutorial misconduct in rebuttal argument?

6. Must this Court remand for an evidentiary hearing, where the trial court abused its discretion in refusing to investigate a claim of juror misconduct, where a juror allegedly introduced highly specialized, extraneous evidence into deliberations?

7. Must Mr. Lopez Leon's convictions be reversed where multiple errors accumulated to deprive him of a fair trial?

8. Is remand for resentencing necessary, where the trial court failed to recognize its authority under RCW 9.94A.535(1)(g) to impose concurrent sentences for multiple serious violent offenses and the court indicated the lengthy consecutive sentences were "tragic," constituting a fundamental defect in Mr. Lopez Leon's sentence?

9. Is remand necessary for the trial court to strike discretionary supervision fees from Mr. Lopez Leon's judgment and sentence?

10. Is remand necessary for the trial court to correct a clerical error in the judgment and sentence?

C. STATEMENT OF THE CASE

Alex Lopez Leon was born in January of 1997 in Los Angeles, California.[1] CP 167. Spanish is his first language. CP 167. When he was still a baby, his family moved to the Baja California region of Mexico, where they lived until Alex

[1] The two co-defendants and two victims all have two surnames. Former Director of the Office of Public Defense, Joanne Moore, explained in her book, "All Mexicans officially carry two surnames, composed of their father's paternal (first) surname and their mother's paternal surname." JOANNE MOORE, IMMIGRANTS IN COURT 93 (1999). "[P]ersons with such names are usually referred to by both family names but sometimes by only one (usually, but not always, the first of the two family names), according to their own preference." Munoz Santos v. Thomas, 830 F.3d 987, 990 n.1 (9th Cir. 2016) (en banc) (quoting CHICAGO MANUAL OF STYLE ¶ 8.11 (16th ed. 2010)). Unfortunately, the four individuals are referred to inconsistently in the record, and the record does not reflect their naming preference. This brief therefore refers to each individual by their first name. No disrespect is intended.

was 14 or 15 years old before returning to the United States. CP 167. Alex's family was poor, and he would often go weeks with "maybe one meal a day." CP 167. Alex suffered abuse at the hands of his mother's boyfriend, and his own father encouraged him to use drugs. CP 167-68. By age 17, Alex was drinking and doing cocaine frequently. CP 168-69.

1. Alex meets the killer, Javier, just hours before Javier murders Adrian and Wilberth.

In May of 2018, Alex was 21 years old. CP 662. He had lived at the Swan Creek Apartments in Tacoma for a couple months. 8/9 RP 986; 9/7 (a.m.) RP 21. Alex was close friends with 16-year-old Johann Valencia Cuevas, who lived next door with his mother, Rosa, and a younger sibling. 8/9 RP 980-83, 986, 1009; Ex. 21, at 3.[2] Johann's older brother, Adrian

[2] Alex's video-recorded interview with the police was admitted into the evidence and played for the jury. Ex. 22. The jury was provided a transcript to read as it watched the video. Ex. 21. The transcript did not go back to the jury during deliberations. CP 119. Both exhibits have been designated, but this brief cites to the transcript for ease of reference.

Valencia Cuevas, also lived in the apartment complex with his girlfriend and sister, Tania. 8/9 RP 983-84.

Adrian was friends with Wilberth Lopez Alcala, who likewise lived in the complex with relatives. 8/9 RP 1065-69, 1084. Wilberth's relative later recalled Javier Valenzuela Felix would come over to visit their roommates at a prior rental house, often getting drunk and belligerent. 8/9 RP 1071-72, 1081-82. By all accounts, Wilberth was the only one among the group who knew Javier, who also apparently lived at the apartment complex, though no one knew where or for how long. 8/9 RP 999-1000, 1036, 1073; Ex. 21, at 16.

May 13, 2018 was Mother's Day. 8/9 RP 988. Alex and Johann hung out that morning. Ex. 21, at 30-32. Sometime that afternoon, Adrian's friend invited him, Johann, and Wilberth to a barbeque. 8/9 RP 1010-11. Alex stayed at the apartments, partying with another acquaintance there. Ex. 21, at 32-33.

Later that night, Alex wanted Johann and Adrian, whom Alex met earlier that day, to meet up to keep the party going. Ex. 21, at 32, 35, 43-44. Alex texted Johann around 10:30 p.m., "Where u at," following up, "Let's kik it." Ex. 242, at 2. Johann responded that he would not be long. Ex. 242, at 2. Thirty-seven minutes later, Alex texted Johann, "You lagging it." Ex. 242, at 2. At 11:19 p.m., Alex texted again, asking, "Where is your homeboy that lives at your sis?" 8/5 RP 869-70. Johann responded a minute later, "That's my brother and he's right here." 8/5 RP 870. At 12:29 a.m., Alex texted Johann again, "I'm waiting dog," and then, "At the stairs." 8/5 RP 871-72.

Johann, Adrian, and Wilberth joined Alex in the parking lot. Ex. 21, at 35; 8/9 RP 1029-30. At some point, Alex recalled, Javier joined them, but Alex could not remember who invited him. Ex. 21, at 35-36. This was the first time Alex had ever met Javier. Ex. 21, at 16, 35. Javier had cocaine with him, which the group used. Ex. 21, at 40.

Around 1:00 a.m., Johann's and Adrian's mother, Rosa, saw the five young men drinking and playing music in a Dodge Charger. 8/9 RP 988-89. Alex entered Javier's contact information into his phone around that same time. 8/5 RP 939; Ex. 21, at 16-17. Police never found any communication, association, or shared connections between Alex and Javier before 1:00 a.m. on May 14. 8/4 RP 775-76; 8/5 RP 940-46.

Johann left the group around 1:40 a.m. and went to bed. 8/9 RP 990. Javier had a gun, so the remaining four went around the corner from the apartments to shoot the gun out the car window. Ex. 21, at 20-22, 37-38; 8/9 RP 1014. Alex admitted they were drunk and "[b]ein' stupid," but the plan was come back afterwards. Ex. 21, at 22, 29. Wilberth drove, with Adrian in the front passenger seat, Javier in the driver side back seat (left rear), and Alex in the passenger side back seat (right rear). 9/1 RP 1469-70; 9/7 (a.m.) RP 16.

Wanting to brag about it later to his friends, Alex recorded a video at 3:56 a.m. of Javier firing the gun into the air

from the car. 8/5 RP 896-97; Ex. 21, at 22, 78. Excited chatter can be heard on the video, followed by approximately 12 gunshots. 8/5 RP 905-06, 936-37.

2. **Javier kills Adrian and then Wilberth. Alex stays quiet in the back seat, terrified he will be next.**

At 4:21 a.m., Alex started another video, though only sounds were recorded. 8/5 RP 898-99. Alex explained he had a feeling something bad was about to happen as Javier reloaded the gun. Ex. 21, at 77-78; 9/7 RP 1672-73. Alex held his phone against his leg so that Javier could not see him recording. Ex. 21, at 78.

A mechanical noise can be heard on the video, possibly the sound of putting the clip in the gun or the hammer cocking. 8/5 RP 937; Ex. 62 (IMG_1197). Nine seconds into the video, there is a single gunshot. 8/5 RP 904. Only Javier's voice can be heard after the gunshot. 8/5 RP 937-38; 8/9 RP 1080. When Alex played the video for police later, he explained Javier shot and killed Adrian. Ex. 21, at 24; 9/7 (a.m.) RP 40-41.

Javier commanded Wilberth to drive somewhere to dispose of Adrian's body, pointing the gun at Wilberth and Alex. Ex. 21, at 24-26. Alex was "fucking scared" and "didn't know what to do," terrified that Javier would shoot him or Wilberth next. Ex. 21, at 24, 46. Alex figured, "I'm done." Ex. 21, at 46. Wilberth pulled onto a quiet street in University Place around 4:38 a.m. 8/30 RP 1330. As Wilberth put the car in reverse, Javier fired the gun again without warning, shooting and killing Wilberth. 9/7 RP 1715; Ex. 21, at 73.

Javier ordered Alex to get in the driver's seat. Ex. 21, at 26. Stunned, Alex told Javier they had to go, explaining later, "I just don't know what to do, I just fuckin' run, you know. I just go." Ex. 21, at 26. Alex had no idea why Javier did not kill him, too. Ex. 21, at 48.

Residential security cameras captured Javier and then Alex climbing out of the rear driver's side window and leaving the scene. 8/4 RP 728-32. Alex can be seen bending his elbow once outside the vehicle. Ex. 14A (3:37); 8/4 RP 732. There

was speculation that Alex may have tucked a gun into his waistband, but no gun is visible on the video. Ex. 14A; 8/30 RP 1340; 9/7 RP 1689-92.

Javier ordered Alex to give him his shirt and hat. Ex. 21, at 49, 79. Alex complied, still terrified of Javier. Ex. 21, at 49; 8/3 RP 683. Pierce Transit video captured the two boarding a bus together at 7:32 a.m. and exiting about 35 minutes later. Ex. 21, at 50-51; 8/30 RP 1311.

Adrian and Wilberth were found deceased within a couple hours, with the vehicle still in reverse and blocking the roadway. 8/2 RP 480-82, 487. Several beers cans were found in the vehicle, at least two with Javier's DNA on them. 8/3 RP 569-71; 8/10 RP 1122-25. Ten spent shell casings were found on the rear driver's side floorboard, where Javier had been sitting. 8/10 RP 1174; 9/7 RP 1695-96. One other shell casing was found behind Adrian's left shoulder. 9/7 RP 1695.

Wilberth had an entrance wound on the right side of his head, slightly behind his ear, and an exit wound above his left

eye. 8/3 RP 599-600. No bullet was recovered. 9/7 (a.m.) RP 17. Adrian had an entrance wound on the left side of the back of his head, but no exit wound. 8/3 RP 625, 631. A damaged bullet was recovered from the right side of Adrian's neck. 8/3 RP 631-32; 9/2 RP 1578. Bullet fragments could be seen on Adrian's X-ray where pieces of the bullet shaved off as it traveled through Adrian's skull. 8/3 RP 639-40. Both gunshot wounds were consistent with the driver's side backseat passenger—where Javier was sitting—pulling the trigger. 8/3 RP 650, 655.

3. **Alex remains in contact with Javier after the killings in an attempt to appease Javier.**

Alex did not immediately go to the police because he knew they would not believe him that he did not participate in the murders. Ex. 21, at 27 ("Whatever I say, I'm fucked."). Alex was also afraid to come forward because he had an outstanding warrant for a federal probation violation. Ex. 21, at 26-27; 8/5 RP 807. Trying to avoid Javier, Alex left his

apartment to stay with a friend in Spanaway. 9/1 RP 1473; 9/7 (a.m.) RP 36.

But Alex also wanted to pacify Javier and keep tabs on him. Ex. 21, at 17-18, 61-62; 9/1 RP 1474-75. On May 15, Alex texted Javier for the first time, "Hey." 8/30 RP 1374. Three days later, on May 18, Javier responded, "Everything okay with you." 8/30 RP 1374. Subsequent text messages between the two indicate Javier was sourcing drugs for Alex to sell. 8/30 RP 1376-85.

Almost exclusively, Alex initiated their conversations and frequently texted Javier multiple times before receiving any response. 8/30 RP 1385-86, 1388, 1410. At one point, Alex told Javier, "As for me like the prisoner says, I don't look, I don't feel, and I don't listen. I just want to make money if possible." 8/30 RP 1390. Javier responded, "It wasn't the best way to have met, but maybe that's how it had to be." 8/30 RP 1390. Alex also relayed to Javier that he had not seen anything on the news identifying who was responsible for the murders.

8/30 RP 1378, 1389. The final communication came on May 25, from Alex's phone to Javier, "Hi. This is Alex's sister. He is not here at the house. Do you know where he might be?" 8/30 RP 1395.

Alex was arrested on June 4 in Spanaway. 8/4 RP 700, 703, 711. He did not try to flee or resist arrest. 8/4 RP 720. Police found no gun or anything else of evidentiary value except Alex's two cell phones. 8/4 RP 720. Javier was arrested on June 21 in Marysville. 8/4 RP 715; 9/7 (a.m.) RP 19-20. Cell phone pings for the two men never placed them in the same location again after the murders. 8/4 RP 721.

Alex agreed to an interview with the police, which was audio and video recorded. 8/4 RP 754-55. He also consented to a search of his cell phone, providing police with his passcode. 8/4 RP 756; 8/5 RP 935.

A search of Alex's cell phone revealed several internet searches for news stories related to the murders. 8/5 RP 882-84. On May 15, Alex searched for "Pierce County anonymous

tips." 8/5 RP 884-85. The next day, he made multiple searches like, "What to do if you witness a murder and are forced to stay quiet?"; "What happens if you witness a murder as a threatened witness?"; and "If someone witnesses a crime do they have a choice whether or not to become an official witness?" 8/5 RP 887-88, 954-55. On May 20, Alex again searched, "Submit a tip." 8/5 RP 955.

Alex was later evaluated by Dr. Kristin Carlson, a clinical psychologist. 9/1 RP 1449-50, 1453. Dr. Carlson concluded Alex's behavior following the murders was likely the result of post-traumatic stress and being in fear for his life. 9/1 PRP 1470-71, 1524. She noted his intrusive thoughts, flashbacks, and avoidance—typical of trauma—including not reporting the murders, fleeing his apartment, and his increased substance use after the murders. 9/1 RP 1472-74, 1499. She concluded Alex stayed in contact with Javier out of self-preservation, to let Javier know he "wasn't going to come forward," so that Javier would not perceive him as a threat. 9/1

RP 1474-76, 1506. Dr. Carlson explained this type of appeasement is a common trauma response, especially following a violent event. 9/1 RP 1475-76.

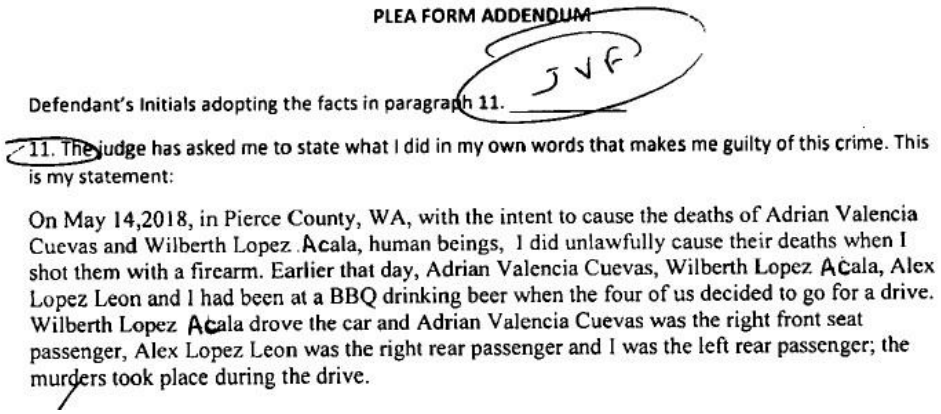
4. Despite Alex's cooperation with police and Javier's admission of guilt, Alex is charged with two counts of first degree premeditated murder.

Both Alex and Javier were charged with two counts of second degree intentional murder with firearm enhancements. CP 1-2. The charges were later amended to two counts of first degree premeditated murder. CP 9-10.

While in Pierce County Jail, Javier made incriminating statements to his cellmate, Joshua Dexter. CP 417-18; Ex. 8. Javier confided in Dexter that the Sinaloa Cartel paid him $20,000 to kill Adrian and Wilberth because they had failed to pay money owed to the cartel. CP 418. Javier told Dexter that Alex was not involved in the homicide and that he should have also killed Alex to ensure there were no witnesses. CP 418.

Javier subsequently pleaded guilty to two counts of second degree murder while armed with a firearm. CP 540. He was sentenced to 366 months in prison. CP 540.

Alex proceeded to a jury trial. 7/22 RP 402. By the time of Alex's trial, however, both Javier and Dexter refused to testify or cooperate with any defense interviews. CP 540-41. Consequently, the only related evidence introduced at trial was the parties' stipulation that Javier, as part of a guilty plea, admitted to shooting Adrian and Wilberth:



PLEA FORM ADDENDUM

Defendant's Initials adopting the facts in paragraph 11. JVF

11. The judge has asked me to state what I did in my own words that makes me guilty of this crime. This is my statement:

On May 14,2018, in Pierce County, WA, with the intent to cause the deaths of Adrian Valencia Cuevas and Wilberth Lopez Acala, human beings, I did unlawfully cause their deaths when I shot them with a firearm. Earlier that day, Adrian Valencia Cuevas, Wilberth Lopez Acala, Alex Lopez Leon and I had been at a BBQ drinking beer when the four of us decided to go for a drive. Wilberth Lopez Acala drove the car and Adrian Valencia Cuevas was the right front seat passenger, Alex Lopez Leon was the right rear passenger and I was the left rear passenger; the murders took place during the drive.

Ex. 500; CP 541-44; 9/1 RP 1468-70.

5. No definitive conclusions could be made about the type of firearm used.

The prosecution's firearm examiner, Brenda Walsh, determined the 11 fired cartridge cases (i.e., shell casings) from the vehicle—the 10 from where Javier was sitting and the one from behind Adrian's shoulder—were all fired by the same gun. 8/10 RP 1139, 1175-76. All the cartridge cases were 9mm caliber. 8/10 RP 1167, 1182. Because no gun was ever found, however, Walsh could not make any conclusions about the type of firearm used. 8/10 RP 1181.

Brenda Walsh also examined the bullet recovered from Adrian. 8/10 RP 1183. She explained the most common weight for a 9mm bullet is 115 grains, while the most common weight for a .380 auto bullet is 95 grains, though not exclusively. 8/10 RP 1138, 1268-69. The "mangled" bullet weighed 93.1 grains. 8/10 RP 1209, 1262.

Despite the damage and shearing to the bullet, Brenda Walsh believed it was possible the bullet lost only two percent

of its mass as it traveled through Adrian's skull and into his neck. 8/3 RP 631-32; 8/10 RP 1266; 9/2 RP 1592-93. She therefore thought the bullet was more consistent with a .380 auto caliber bullet than a 9mm. 8/10 RP 1189. She believed it was "possible" two guns were involved, but ultimately could not say whether the bullet was fired by a different gun than the cartridge cases. 8/10 RP 1250-51, 1261, 1280.

Firearm and ballistics expert Greg Walsh (no relation to Brenda Walsh) testified for the defense. 9/2 RP 1548, 1603. He believed it more likely the bullet was originally a 115-grain, 9mm caliber bullet rather than a 95-grain, .380 auto caliber bullet. 9/2 RP 1596, 1600-01. For one, he noted the length of the deformed bullet was 13.04 millimeters, considerably longer than the standard length of 11.18 millimeters for a .380 auto bullet that weighs 95 grains. 9/2 RP 1573, 1583-84. It would be highly unusual for a bullet to lengthen that much upon impact, especially given the noted blunting of the bullet's nose. 9/2 RP 1592-93. Greg Walsh also emphasized the bullet's

substantial loss of mass and obvious shearing of material. 9/2 RP 1578, 1597.

6. The prosecution introduces testimony about Mexican cartels, drug smuggling, and the supposed characteristics of Hispanic drug dealers.

Before testimony began, defense counsel moved to exclude text messages between Javier and Alex about buying and selling drugs, arguing evidence of drug dealing was prejudicial. 7/22 RP 290-91. The prosecution asserted the evidence was relevant to its theory that Alex participated in the murders "in order to become involved in drug trafficking, in order to start selling drugs himself." 7/22 RP 292.

Defense counsel responded, "[t]here's absolutely no evidence, not even a scintilla of evidence" of the prosecution's theory of "some initiation into a drug group or something like that." 7/22 RP 295. Counsel maintained "[t]he only reason the State wants to bring this evidence forward is to raise a thought, oh, this is a step of initiation to get involved in some type of

drug cartel-type situation. That's the only reason. And that can be only prejudicial and will deny my client a fair trial." 7/22 RP 296.

The trial court admitted the evidence under ER 404(b), reasoning it was relevant to the prosecution's theory of motive. 7/22 RP 298.

The prosecution thereafter introduced testimony from Pierce County Sherriff's Deputy Sergio Madrigal Mendoza, who works in undercover narcotics and vice investigations, with a focus on "Hispanic drug sources and drug informants." 8/30 RP 1355-57, 1371. Deputy Madrigal Mendoza was asked by the prosecution to interpret the text messages between Javier and Alex. 8/30 RP 1372. He did not review any other discovery and did not conduct any investigation related to the case. 8/30 RP 1403-04. He testified for the better part of an afternoon. 8/30 RP 1355-1417.

Deputy Madrigal Mendoza explained he attended school in California, where he "was taught how cartels operate

specifically from Mexico." 8/30 RP 1358. The prosecution then inquired whether there was a "hierarchy" in the drug industry. 8/30 RP 1361. Deputy Madrigal Mendoza replied:

> Well, I would say in the past, a lot of the drugs -- we had them domestically, but a lot of the drugs and issues that we've been having in the county, particular our area, are coming from Mexico or being delivered across the border. So I would say in the hierarchy of things of narcotic investigations, you have your bosses, your cartel leaders, that are working in Mexico or running cartels that are involved in transporting large quantities of drugs across the border throughout the United States.

8/30 RP 1361. The prosecution followed up, inquiring "about how drugs get into the State of Washington." 8/30 RP 1361. Deputy Madrigal Mendoza testified:

> There are several different ways. And when you're dealing with an organization that is capable of getting drugs into the country, it's a very complex organization. I would equate it with a militaristic-type organization where you have a leader and then they have their captains or lieutenants that are in change of corruption, bribes, distribution, enforcers. Then you have your sergeants that are getting customers or distribution to different hubs.

> And the distribution is done in several different ways as well. I mean, you have huge farms where it's actually produced -- huge areas where it's being produced. From there it's packaged and shipped of[f] to a bordering state where then, there, it's either brought across via trailer via freight where you have people that are bought off or it's going through tunnels. Once it gets across the border, they have stash houses where they house it until they figure out how to get it further into the different hubs of the state. You also have organizations that use public transportation, where a person will get onto a bus carrying a couple of kilos of heroin, meth, Coke, and then that person will try to blend in and try to get to, let's say for example, Washington. If you're in Washington, the main hubs are the east side of the state, Yakima or Wenatchee. The other hub, which is Everett, north King County. Then your third hub, the one that I've seen the most is probably here in Pierce County corridor, Tacoma area.

8/30 RP 1361-63. Deputy Madrigal Mendoza went on to explain the "chain of command" in narcotics trafficking. 8/30 RP 1363-64. He testified, "You're not going to have our cartel boss from Mexico communicating with a person dealing in balls or teeners or grams or ounces in Washington state." 8/30 RP 1364. The prosecution inquired again about Deputy

Madrigal Mendoza's expertise "related to Mexican drugs," to which he reiterated his focus is on "Hispanic drug sources." 8/30 RP 1371.

Deputy Madrigal Mendoza proceeded to testify that drug dealers (i.e., sources) and their runners develop trust over time. 8/30 RP 1365. He explained, "in Hispanic drug dealers which is one of my main focus, that trust is even less. They are a lot more cautious." 8/30 RP 1365. He continued, "You say the wrong thing, you ask too many questions, then they're not going to want to do business with you." 8/30 RP 1365-66. Deputy Madrigal Mendoza went on to explain drug dealers often use multiple phones and "Hispanic drug dealers," in particular, "a lot of them use WhatsApp a lot." 8/30 RP 1370. He testified the communication application WhatsApp is preferred by "Hispanic drug sources" because it is encrypted, which makes it more difficult for law enforcement "to be able to get a warrant on the app." 8/30 RP 1370.

The prosecution then introduced the text messages between Javier and Alex through Deputy Madrigal Mendoza. 8/30 RP 1372-73. At one point, Alex asked whether Javier had WhatsApp, though no messages from WhatsApp were ever introduced. 8/5 RP 840-41; 8/30 RP 1389. Deputy Madrigal Mendoza testified their texts indicated a level of trust suggesting it was "possible" (8/30 RP 1391) Javier and Alex had been dealing drugs together for some time, but agreed there was no evidence of contact between the two before May 14, 2018. 8/30 RP 1395-97, 1415-16.

Deputy Madrigal Mendoza did not, at any point, testify the texts indicated the drugs Javier and Alex were selling arrived from Mexico, were smuggled across the border, or that either Javier or Alex was working with a Mexican cartel to distribute the drugs. See 8/30 RP 1373-1417.

The prosecution elicited, or tried to elicit, cartel evidence through other witnesses, as well. For instance, the prosecution asked Detective Ryan Salmon about Alex's web searches:

> Q. And then, were there also searches related to the Sinaloa cartel?
>
> A. Yes.
>
> Q. And how do you know that, sir?
>
> A. There's a search item on May 16th, 2018, at 3:09 a.m. which reads "Sinaloa Cartel Seattle."
>
> Q. Are there also searches relating to drug busts for Mexican cartels, arrest tied to Mexican drugs, things of that nature?
>
> A. Yes.

8/5 RP 886-87; Ex. 133, at 1-2. The prosecution established both Wilberth and Javier were from Sinaloa. 8/4 RP 789; 8/9 RP 1079. In his interview, Alex told police he thought Javier might belong to the Sinaloa Cartel. Ex. 21, at 59-60. The prosecution tried, but failed, to establish Alex was also from Sinaloa. 8/4 RP 789; 9/1 RP 1526. There was no evidence of Alex's involvement with or connection to the Sinaloa Cartel.

7. The jury convicts Alex, but the trial court refuses to investigate a claim of juror misconduct in deliberations.

In addition to instructions on first degree murder, the jury was instructed on the lesser offense of second degree intentional murder for both counts. CP 109-13.

During deliberations, the jury inquired whether they were missing the transcript from Alex's interview. CP 119. The court informed the jury that the transcript, exhibit 21, had not been admitted into evidence. CP 119.

The jury could not reach a verdict on the first degree murder charge related to Adrian, instead finding Alex guilty of second degree murder (Count 1). CP 120, 595. The jury found Alex guilty of first degree murder on the charge related to Wilberth (Count 2). CP 123. The jury found Alex or an accomplice was armed with a firearm on both counts. CP 121-22.

Following the verdicts, defense counsel moved for a new trial or, alternatively, an evidentiary hearing based on juror

misconduct in deliberations. CP 128-36; 10/8 RP 14-16. Counsel averred that, after the verdict, the foreperson told the parties "the jury had found something that the State had not found." CP 138. Specifically, a self-identified speech pathologist, Juror 8, read Alex's lips in the video of his police interview, believed his mouth formed a "w" rather than an "h," and informed the jury Alex actually said "*we* did it" instead of "*he* did it." CP 138.

Defense counsel also submitted a declaration from his investigator, Ron Bone, who spoke with Juror 10 after the trial. CP 140. Juror 10 relayed the same information to Mr. Bone about the speech pathologist's lip reading, explaining the jurors then replayed the video interview at different speeds "at least 15 to 20 times" during deliberations. CP 142. As they did, Juror 8 pointed out how Alex "moved his lips and cheeks when saying we during other parts of the interview." CP 142.

The trial court ordered the parties to have no further contact with jurors until the court ruled on how to proceed.

10/8 RP 5-6. At an initial hearing on the matter, the court determined an evidentiary hearing was necessary, at which it would call Juror 8 to testify. 10/8 RP 23. The court reasoned "the information needs to be ascertained, and then the motion can be properly argued." 10/8 RP 17. The court emphasized the investigation should "appropriately be handled by the Court and not by either State or Defense." 10/8 RP 17.

A week later, however, the court reversed course, ruling that questioning Juror 8 inhered in the verdict and was therefore prohibited. 10/15 RP 2. The court refused to conduct any further investigation and did not alter its ruling prohibiting the parties from contacting jurors. 10/15 RP 2-3.

The court thereafter denied the defense motion for a new trial, finding there had not been a "strong, affirmative showing of misconduct." 10/22 RP 12. The court believed Juror 8, who identified herself as a speech pathologist in voir dire, "did not introduce any new or novel evidence." 10/22 RP 12. The court

reiterated its conclusion that the allegation of misconduct "inheres in the verdict." 10/22 RP 13.

8. The trial court sentences Alex to 534 months in prison—14 more years than Javier received.

Multiple family members provided letters expressing their love and support for Alex. CP 644-52, 671-75.

Alex has one prior federal conviction for possession of a controlled substance with intent to distribute. CP 191, 212. The standard range for second degree murder (Count 1) is 123 to 220 months, plus the 60-month firearm enhancement. CP 221. The standard range sentence for first degree murder (Count 2) is 250 to 333 months, plus another 60-month firearm enhancement. CP 221. Because both are serious violent offenses, the sentences are presumptively consecutive. CP 656.

Relying on Dr. Carlson's report, defense counsel asked for the low end of the standard range, emphasizing Alex's age and youthfulness at the time of the offenses. CP 162-65. At sentencing, counsel appeared to request an exceptional sentence

downward based on Alex's youthfulness, noting, "If the Court does take that into consideration, there is no high or low end. The Court is open to whatever the Court deems is an appropriate sentence." 11/19 RP 15.

The prosecution opposed an exceptional sentence downward, pointing to characteristics it believed demonstrated Alex's sophistication and maturity, like his single prior conviction and his limited work history at fast food restaurants. CP 662-65. The prosecution instead advocated for a mid-range sentence of 171.5 months on Count 1 and 291.5 months on Count 2. CP 665; 11/19 RP 9-10.

No one addressed whether the presumptively consecutive sentences would result in a sentence that was clearly excessive in light of the purposes of the Sentencing Reform Act of 1981 (SRA). CP 162-65, 653-70; 11/19 RP 4-15.

The trial court acknowledged Alex was only 21 years old at the time of the offenses, but did not find youth to be a contributing factor in his involvement. 11/19 RP 17. The court

thereafter noted the legislature "has removed discretion when it comes to firearm sentencing enhancements as well as the option of running concurrently or consecutively serious violent offenses that are not the same course of conduct." 11/19 RP 18-19. The court rejected the prosecution's request for a mid-range sentence, instead imposing 147 months on Count 1 and 267 months on Count 2. 11/19 RP 19. But, because of the consecutive sentences and consecutive firearm enhancements, the court sentenced Alex to a total of 534 months in prison, 168 months more than Javier's sentence. 11/19 RP 19; CP 225.

D. ARGUMENT

1. **There is insufficient evidence to sustain Alex's convictions, where the record allows for nothing more than speculation that Alex participated or was ready to assist in the murders.**

Reasonable inferences from the evidence allow only for the conclusion that Alex was present when Javier killed Adrian and Wilberth. Mere presence and knowledge of the crime is insufficient as a matter of law to establish participation. The

prosecution's theories for Alex's complicity amounted to nothing more than speculation based on mere possibilities. Due process demands more before a person can be deprived of their liberty. The prosecution's failure to prove Alex's participation in the murders necessitates dismissal of Alex's convictions.

Due process requires the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, drawing all reasonable inferences in favor of the prosecution. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

The linchpin in this case is distinguishing between reasonable inferences, on the one hand, and speculation, on the other. "A 'reasonable' inference is one that is supported by a chain of logic, rather than . . . mere speculation dressed up in the

guise of evidence." Juan H. v. Allen, 408 F.3d 1262, 1278 (9th Cir. 2005); accord Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911) (reasonable inferences must be "logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption"). "[A]n inference is not reasonable if based on speculation or conjecture." State v. Jameison, 4 Wn. App. 2d 184, 197, 421 P.3d 463 (2018); accord Vasquez, 178 Wn.2d at 16.

This, of course, raises the question, what constitutes speculation or conjecture? The court of appeals recently answered this question in Jameison. The Jameison court held our constitution demands that inferences in criminal cases be "based only on likelihood, not possibility." 4 Wn. App. 2d at 200. "When an inference supports an element of the crime, due process requires the presumed fact to flow more likely than not from proof of the basic fact." Id. The court explained, "[w]hen evidence is equally consistent with two hypotheses, the evidence

tends to prove neither." Id. at 198. Courts therefore cannot infer a circumstance "when no more than a possibility is shown." Id.

The jury convicted Alex of first degree premeditated murder for Wilberth's death and second degree intentional murder for Adrian's death. CP 120, 123. Premeditation is the distinction between first and second degree intentional murder. RCW 9A.32.030, .050. It means "thought over beforehand," and "must involve more than a moment in point of time." CP 106. Premeditation can be proved through circumstantial evidence only "where the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." State v. Hummel, 196 Wn. App. 329, 356, 383 P.3d 592 (2016) (quoting State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995)).

The prosecution claimed Alex participated in the murders either as a principal or an accomplice. 9/8 RP 1801. The law on accomplice liability is well established. A person is not an accomplice unless he knowingly "solicits, commands, encourages, or requests" commission of a crime, or aids in the

planning or commission thereof. RCW 9A.08.020(3); see also CP 104. Put another way, an accomplice must "associate[] himself with the undertaking, participate[] in it as in something he desires to bring about, and seek[] by his action to make it succeed." In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)).

Critically, "[m]ere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity." State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). "Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt." Wilson, 91 Wn.2d at 492. "Rather, the State must prove that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus 'demonstrating a community of unlawful purpose at the time the act was committed.'" State v. Truong, 168 Wn. App.

529, 540, 277 P.3d 74 (2012) (quoting State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485 (1982)).

At the outset, it is important to note the prosecution never established any motive for the murders. Nor was there any evidence of an agreement between Javier and Alex to carry out the murders. The prosecution's theories for Alex's participation amounted to nothing more than speculation based on mere possibilities, which are insufficient to sustain Alex's convictions. They will be addressed in turn.

The prosecution began by claiming Alex "assisted" Javier "in making sure Adrian was at the party," pointing to Alex's 11:19 p.m. text to Johann asking about his brother. 9/8 RP 1783-84. This claim of assistance was pure speculation. Alex explained he wanted Johann and Adrian, whom he had met earlier that day, to party with him. Ex. 21, at 32, 35, 43-44. Meanwhile, the prosecution's own witness admitted he had "no idea" why Alex was looking for Adrian. 8/5 RP 950. The evidence was not even "equally consistent with two hypotheses,"

which does not amount to a reasonable inference anyway. Jameison, 4 Wn. App. at 198.

Combine this with the fact that the prosecution failed to prove Alex had even met Javier by 11:19 p.m. The only evidence was that Javier joined the party after Johann, Adrian, and Wilberth arrived. Ex. 21, at 35-36. Alex put Javier's contact information in his phone at 1:00 a.m., nearly two hours after his text to Johann. 8/5 RP 939. Javier later texted Alex, "It wasn't the best way to have met," further indicating they met for the first time sometime late on May 13 or early on May 14. 8/30 RP 1390. While Deputy Madrigal Mendoza testified it was "possible" Alex and Javier had met before, mere possibilities do not reasonable inferences make. 8/30 RP 1391. Indeed, the investigating detectives conceded they found no prior communication or associations and, furthermore, agreed it appeared they met on May 14 around 1:00 a.m. 8/4 RP 775-76; 8/5 RP 940-46; 9/7 RP 1702.

The prosecution next pointed to the fact that Alex started the video where Adrian was shot nine seconds before the shooting, indicating he "knew in advance that the decision had been made to kill Adrian." 9/8 RP 1788. The prosecution was forced to concede Alex was not the shooter, because he was filming. 9/8 RP 1790. Alex admitted in his interview that he started the video because he suspected something bad was about to happen after Javier reloaded the gun. Ex. 21, at 77-78; 9/7 RP 1672-73. But, as discussed, presence and knowledge alone are insufficient for accomplice liability. Luna, 71 Wn. App. at 759. Foreseeability that another might commit the crime is likewise insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). The fact that Alex started the video nine seconds before Javier shot Adrian at most establishes knowledge, but not that Alex encouraged the murder or assisted Javier in any way.

The prosecution emphasized Alex's lack of audible reaction after Javier shot Adrian, claiming again, "he knew what was coming." 9/8 RP 1791. Suggesting complicity from

this was utterly speculative. It is broadly recognized there is no "typical" response to trauma. See, e.g., State v. Black, 109 Wn.2d 336, 343-44, 745 P.2d 12 (1987). Indeed, Wilberth, who just witnessed his close friend shot in the head at point blank range, also made no audible response. 8/5 RP 937-38. Alex's and Wilberth's lack of verbal response is just as consistent with shock and fear. Ex. 21, at 24 ("I was fucking scared . . . [Wilberth] was fucking scared, yes. We were all scared."). It bears repeating, "[w]hen evidence is equally consistent with two hypotheses, the evidence tends to prove neither." Jameison, 4 Wn. App. at 198.

The prosecution's next theory was equally speculative. The prosecution suggested Alex supplied the 9mm handgun, which he handed to Javier to shoot out the window, before Javier gave the gun back to Alex. CP 635. Javier supposedly drew his own .380 automatic gun and shot Adrian. CP 635; 9/8 RP 1790. According to the prosecution, Alex then used the 9mm handgun to shoot Wilberth. 9/8 RP 1797. The prosecution claimed the

cartridge case behind Adrian's shoulder must be from the shot that killed *Wilberth*. 9/8 RP 1798-99. No explanation for the purportedly missing .380 auto casing, other than to guess a revolver may have been used. 9/8 RP 1810.

This theory of two guns was based solely on Brenda Walsh's testimony that the bullet recovered from Adrian was more consistent with a .380 auto caliber bullet than a 9mm caliber bullet, even though all the shell casings in the vehicle were fired by the same gun. 8/10 RP 1175-76; 9/8 RP 1810. But, because no firearm was ever recovered, all Ms. Walsh could conclude was, "It is *possible* that there were two guns." 8/10 RP 1280 (emphasis added). She never testified it was likely or probable that two guns were used. She could not say whether the bullet was fired by the same gun as the shell casings. 8/10 RP 1250-51. The government cannot deprive of person of his liberty based on "mere possibilities." Jameison, 4 Wn. App. 2d at 198. Due process demands more. Id. at 200.

The theory that Alex shot Wilberth therefore amounted to speculation. This is particularly apparent when considering Javier's admission in his guilty plea to shooting both Adrian and Wilberth—"I shot them with a firearm"—an admission the Pierce County Prosecutor's Office accepted and, furthermore, stipulated to at Alex's trial. Ex. 500; CP 539-44; see Smith v. Groose, 205 F.3d 1045, 1052 (8th Cir. 2000) (holding the prosecution's "use of inherently factually contradictory theories" to obtain convictions against multiple defendants "violates the principles of due process"). Javier's admission was, in turn, consistent with Alex's interview, where he told police Javier shot both Adrian and Wilberth.[3] Ex. 21, at 24, 73. The prosecution introduced no

[3] The prosecution also noted Alex's description of how Javier shot Wilberth was inconsistent with the bullet trajectory. 8/4 RP 766-67; 9/8 RP 1800-01. But Alex explained in his interview, "I think he went like this," but "I was trying to not see him with the gun," reiterating he caught only "glimpses." Ex. 21, at 76. The two detectives present for the interview agreed Alex said he did not really know how Javier shot Wilberth because he was trying not to look. 8/4 RP 783-84; 9/7 RP 1716-17.

evidence that undermined Javier's admission to being the shooter. See infra argument 5.

The prosecution next argued that, upon climbing out the rear driver's side window, "you see [Alex] acting in a fashion that is consistent with placing a gun in his rear waistband." 9/8 RP 1802. But the relevant video shows, from a significant distance away, Alex merely bending his elbow (upper right):

Ex. 14A (3:37). No gun is visible, and the prosecution's witnesses agreed as much. 9/7 RP 1691. The movement *could* be consistent with Alex tucking a gun in his waistband. 9/7 RP 1689-90. But it could also be consistent with many other

innocuous actions, like adjusting his shirt or pants after climbing out a window. 9/7 RP 1691-92. The video does not allow for the conclusion that it is "more likely than not" Alex put a gun in his waistband. Jameison, 4 Wn. App. 2d at 200.

The only remaining evidence is Alex's conduct after the murders, including staying in touch with Javier and apparently selling drugs with him. But, again, the prosecution needed to establish Alex was not only present, but shared Javier's criminal intent and was ready to assist Javier *at the time of the murders*. Truong, 168 Wn. App. at 540. Alex's text messages with Javier afterwards establish nothing more than complicity to sell drugs, not complicity to murder Adrian and Wilberth. Conduct like switching shirts and then offering to keep Javier updated about related news stories at most amounted to rendering criminal assistance after the fact. RCW 9A.76.050; see State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994) ("Robinson's subsequent action of driving away with Baker could not have

aided and abetted Baker to commit the second degree robbery because by then, Baker had already completed that crime.").

At the very least, Alex's conduct after the fact is insufficient to establish he acted with *premeditated* intent to kill Wilberth. This court of appeals recognized as much in Hummel. There, the prosecution failed to prove premeditation even though there was evidence Hummel disposed of his wife's body, concealed her death, and then fraudulently obtained her disability checks. Hummel, 196 Wn. App. at 356. Such evidence did not demonstrate "deliberation or reflection" *before* Hummel killed his wife. Id. So, too, in Alex's case, where any assistance Alex offered Javier afterwards did not establish deliberation or reflection *before* Wilberth was shot.

There is no dispute all reasonable inferences must be drawn in the prosecution's favor. But this Court must be mindful of what is a *reasonable* inference and what is speculation. Close scrutiny of the prosecution's case demonstrates it was founded solely on speculation, which is insufficient to sustain Alex's

convictions. The remedy is to reverse Alex's convictions and remand for the charges to be vacated. Vasquez, 178 Wn.2d at 18.

2. **The prosecution's deliberate appeal to jurors' potential biases against Latinx individuals, utterly repugnant to Alex's right to a fair trial, necessitates reversal of Alex's convictions.**

"If justice is not equal for all, it is not justice." State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). The promise of equal justice extends to Latinx individuals. The prosecution in Alex's case undermined this promise by introducing inflammatory evidence of Mexican cartels, illegal drug smuggling across the United States-Mexico border, and the supposed characteristics of Hispanic drug dealers. The only apparent purpose of this evidence was to appeal to jurors' latent biases against Mexican immigrants[4] and their fears regarding the

[4] Alex was born in the United States. CP 167. But the jury never learned this. CP 588. Given that Alex's first language is Spanish, along with his surname, it is likely some jurors assumed Alex emigrated from Mexico. Ex. 21, at 69. Indeed, as Chief Justice Chief Justice González recently emphasized, "bias, intentional and unintentional, persists among some residents of Washington against people they *perceive* as

illegal drug trade in their own community. The Washington Supreme Court has made clear these types of appeals to racial and ethnic bias will not be tolerated in our criminal justice system. Reversal of Alex's convictions is the only remedy.

a. *Reversal is required where it is apparent to an objective observer that the prosecution appealed to jurors' potential racial or ethnic biases.*

"[D]iscrimination on the basis of race, 'odious in all aspects, is especially pernicious in the administration of justice.'"[5] Peña-Rodriguez v. Colorado, 580 U.S. 206, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (quoting Rose v. Mitchell, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)). Consequently, "theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible

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immigrants from countries south of the United States." State v. Zamora, 199 Wn.2d 698, 723, 512 P.3d 512 (2022) (González, C.J., concurring) (emphasis added).

[5] While "Hispanic" or "Latinx" identifies a person's ethnicity, not their race, the principles discussed apply to both race and ethnicity. Zamora, 199 Wn.2d at 704 n.6.

in a fair and impartial trial." Monday, 171 Wn.2d at 678 (quoting State v. Dhaliwal, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)).

"Because the prosecutor is a representative of the State, it is especially damaging to these constitutional principles when the prosecutor introduces racial discrimination or bias into the jury system." Zamora, 199 Wn.2d at 710. A prosecutor "gravely violates a defendant's . . . right to an impartial jury when [they] resort[ ] to racist argument and appeals to racial stereotypes or racial bias to achieve convictions." Id. (alterations in original) (quoting Monday, 171 Wn.2d at 676).

Race-based prosecutorial misconduct, "so repugnant to the concept of an impartial trial," therefore requires a distinct set of standards.[6] Zamora, 199 Wn.2d at 709 (quoting Monday, 171 Wn.2d at 680). Specifically, courts must examine whether the

[6] "Unlike the rules for general prosecutorial misconduct, the rule for race-based prosecutorial misconduct does not differentiate between a defendant who objects and one who does not object." Zamora, 199 Wn.2d at 709 n.11.

prosecutor's conduct "flagrantly or apparently intentionally appealed to jurors' potential racial bias." Id. at 718. To make this determination, courts apply the "objective observer" standard from GR 37. Id. That is, courts must ask "whether an objective observer could view the prosecutor's questions and comments during [trial] as an appeal to the jury panel's potential prejudice, bias, or stereotypes" regarding a particular race or ethnicity. Id. "The objective observer is a person who is aware of the history of race and ethnic discrimination in the United States and aware of implicit, institutional, and unconscious biases, in addition to purposeful discrimination." Id.

Critically, "[n]ot all appeals to racial prejudice are blatant." Monday, 171 Wn.2d at 678. Subtle references to racial bias can be "just as insidious" and "[p]erhaps more effective." Id. In Monday, for instance, the prosecutor began referring to the "police" as "po-leese" on direct-examination a witness, to "subtly, and likely deliberately," call attention the witness's race and to emphasize the prosecutor's claim that "[B]lack folk don't

testify against [B]lack folk." Id. at 679. In State v. McKenzie, the prosecution introduced the concept of a "gorilla pimp," evoking the offensive, dehumanizing practice of analogizing Black men to primates. 21 Wn. App. 2d 722, 730-31, 508 P.3d 205 (2022). Courts must therefore be "vigilant of conduct that appears to appeal to racial or ethnic bias even when not expressly referencing race or ethnicity." Zamora, 199 Wn.2d at 721.

In Monday, the Washington Supreme Court adopted the heightened constitutional harmless error standard in evaluating race-based prosecutorial misconduct. 171 Wn.2d at 680. Very recently, however, the court revisited this standard, recognizing "Monday's past effort to address race-based prosecutorial misconduct by applying a harmless error standard has proved insufficient to deter such conduct." Zamora, 199 Wn.2d at 722. "In its place," the court announced, "we adopt the tested and proven rule of automatic reversal." Id. Put simply, such misconduct "necessarily results in incurable prejudice and thus cannot be deemed harmless." Id.

b. *The prosecution deliberately introduced evidence of Mexican cartels, drug smuggling, and the purported characteristics of Hispanic drug dealers, in an effort to appeal to jurors' potential bias against individuals perceived to be Mexican immigrants.*

There is no dispute the heightened standard articulated in Monday and Zamora "does not apply every time a prosecutor mentions race." In re Pers. Restraint of Sandoval, 189 Wn.2d 811, 834, 408 P.3d 675 (2018). Rather, "[i]t applies only when a prosecutor mentions race in an effort to appeal to a juror's potential racial bias, i.e., to support assertions based on stereotypes rather than evidence." Id.

For instance, Sandoval was alleged to have assisted a retaliatory gang-related shooting. Id. at 816. No race-based misconduct occurred where prosecutor the referred to Asian/Pacific Islanders one time and did so only to explain the hierarchy of a particular gang's membership, to which Sandoval belonged. Id. at 816, 834. Similarly, the heightened standard did not apply in Gentry, where Gentry's race was "legitimately tied

to the physical and circumstantial evidence pointing to Gentry as the killer." In re Pers. Restraint of Gentry, 179 Wn.2d 614, 637-38, 316 P.3d 1020 (2014).

Conversely, the court found race-based prosecutorial misconduct in the recent Zamora case. There, a mistaken report of vehicle prowling led to a violent altercation between Zamora, a Latino, and the police while Zamora was high on drugs. Zamora, 199 Wn.2d at 713, 719. The prosecutor began voir dire "by introducing the topics of border security, illegal immigration, and crimes committed by undocumented immigrants." Id. at 703. He repeatedly elicited jurors' comments and views on these topics. Id. For instance, he asked whether jurors had heard of a recent publicized drug bust along the border in Arizona. Id. He even inquired whether the prospective jurors could "make room" for the idea that undocumented immigrants commit crimes against people's loved ones. Id. at 713.

The Zamora court held the "apparent purpose of the remarks was to highlight the defendant's perceived ethnicity and

invoke stereotypes that Latinxs are 'criminally' and 'wrongly' in the country, are involved in criminal activities such as drug smuggling, and pose a threat to the safety of 'Americans.'" Id. at 719. The court emphasized the case "was not remotely related to immigration" and "had nothing to do with borders or border security." Id. Consequently, "[a]ny mention of border security, immigration, undocumented immigrants, and drug smuggling was wholly irrelevant." Id.

The court also recognized "our nation's history—remote and recent—is rife with examples of discrimination against Latinxs based on ethnicity." Id. Contemporaneous news coverage on related topics "often conveyed implicit or explicit prejudices and stereotypes about Latinxs." Id. at 720. Indeed, expressions of anti-Mexican sentiment premised on their dangerous ties to drug-dealing have been a prominent tool used to garner political support. As a candidate for president, Donald Trump tweeted, "The border is wide open for cartels & terrorists. Secure our border now. Build a massive wall & deduct the costs

from Mexican foreign aid!"[7] He insisted Mexican immigrants are "bringing drugs. They're bringing crime. They're rapists."[8] Consequently, in Zamora, an objective observer, aware of this history, "could understand the prosecutor's questions and comments as a flagrant or apparently intentional appeal to the jurors' potential racial or ethnic bias toward Latinxs." 199 Wn.2d at 721.

Other jurisdictions likewise recognize it is inappropriate for the prosecution to "single out one racial minority for different treatment." Monday, 171 Wn.2d at 678. In Commonwealth v. Tirado, 375 A.2d 336, 338 (Pa. 1977), for example, the prosecution appealed to racial bias by introducing testimony about the "machismo" characteristic supposedly "embraced by

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[7] Abby Hamblin, Everything Donald Trump Tweeted About Mexico Since 2015, DAILY PRESS (Aug. 31, 2016, 3:20 PM), https://www.dailypress.com/sdut-donald-trump-twitter-on-mexico-2016aug31-htmlstory.html.

[8] Katie Reilly, Here Are All the Times Donald Trump Insulted Mexico, TIME (Aug. 31, 2016, 11:35 AM), http://time.com/4473972/donald-trump-mexico-meeting-insult.

Puerto Rican males," in an attempt to rebut a self-defense claim. The Pennsylvania Supreme Court held "[t]he issue for the jury, however, was to decide the particular motivations behind the actions of appellant and of the victim, not those allegedly belonging to Puerto Rican males in general." Id. "What other individuals of the same ethnic, racial, or religious background might have done in a similar situation," the court explained, "is irrelevant." Id.

The Ninth Circuit similarly held in United States v. Cabrera, 222 F.3d 590, 596 (9th Cir. 2000), that an officer's testimony "about how Cubans package their drugs may have been relevant to other aspects of the case; however, it was prejudicial because it added to the perception that Cuban drug dealing was a city-wide problem in Las Vegas." Id. The court stressed, "[t]he fairness and integrity of criminal trials are at stake if we allow police officers to make generalizations about racial and ethnic groups in order to obtain convictions." Id. at 597.

In Alex's case, the prosecution engaged in analogous race-based misconduct. Through Deputy Madrigal Mendoza, the prosecution elicited testimony about Mexican cartels and drug smuggling across the United States-Mexico border. He testified, "a lot of the drugs and issues that we've been having in the county, *particular our area*, are coming from Mexico or being delivered across the border." 8/30 RP 1361 (emphasis added). He explained drugs are being smuggled by Mexican cartels into the United States "via trailer via freight where you have people that are bought off or it's going through tunnels." 8/30 RP 1362. He repeatedly discussed Mexican cartels and their hierarchy—"they have their captains or lieutenants that are in change of corruption, bribes, distribution, enforcers." 8/30 RP 1361-62, 1364. And, similar to Cabrera, he reiterated one of the "main hubs" for Mexican drug trafficking is "here in Pierce County corridor, Tacoma area." 8/30 RP 1362-63.

Just like in Zamora, an objective observer could view Deputy Madrigal Mendoza's testimony as an appeal to jurors'

potential prejudice against individuals perceived to be Mexican immigrants. Text messages between Javier and Alex after the murders indicate Javier was supplying drugs for Alex to sell. But there was no evidence the drugs were smuggled from Mexico. Nor was there any evidence Javier or Alex worked for a cartel or obtained the drugs through a cartel.[9] The only apparent connection was Javier and Alex are Mexican and were selling drugs. In other words, the prosecution invited the jury to infer Javier and Alex were part of the scourge of Mexican cartels and illegal drug smuggling based solely on the fact that they are Mexican.

There was simply no relevance to discussing cartels or drug smuggling except to inflame jurors' possible prejudices. This is particularly apparent with Deputy Madrigal Mendoza's emphasis that Tacoma—the very place where Alex was tried—

[9] Alex speculated in his interview that Javier might belong to the Sinaloa Cartel. Ex. 21, at 59-60. Introduction of this evidence was an equally improper appeal to ethnic prejudices, where nothing linked the murders or the drug dealing to the Sinaloa Cartel. See infra argument 3.

was a "hub" for Mexican narcotics trafficking. 8/30 RP 1361-63. The goal was obvious: to play into jurors' fears of violent Mexican cartels smuggling drugs into their very own city. See State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006) ("A prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups[.]"; State v. Loughbom, 196 Wn.2d 64, 69, 470 P.3d 499 (2020) ("We do not convict to make an example of the accused, we do not convict by appeal to a popular cause, and we do not convict by tying a prosecution to a global campaign against illegal drugs."). Just as the court summarized in Zamora, the apparent purpose of these remarks was to highlight Alex's perceived ethnicity and invoke stereotypes that Mexicans are "involved in criminal activities such as drug smuggling" and "pose a threat to the safety 'Americans.'" 199 Wn.2d at 719.

Any argument by the prosecution that the cartel and drug smuggling evidence was potentially relevant because of Javier's confession to his cellmate, Joshua Dexter, should be rejected.

The prosecution knew by the start of trial that Javier and Dexter were not cooperating. 7/20 RP 35-36. The parties entered a stipulation on August 2, 2021, agreeing that Javier's confession to Dexter was inadmissible and the only admissible evidence was Javier admitted in his guilty plea to being the shooter. CP 539-44. The prosecution did not introduce Deputy Madrigal Mendoza's testimony until August 30, long after that stipulation. 8/30 RP 1290. By then, the prosecution was well aware there would be no evidence introduced that Javier was paid by the Sinaloa Cartel to execute Adrian and Wilberth—leaving no remaining connection to the Sinaloa Cartel or any other cartel.

Further singling out Alex based on his ethnicity, Deputy Madrigal Mendoza repeatedly testified to the purported characteristics of Hispanic drug dealers. See, e.g., 8/30 RP 1364, 1365, 1369, 1370, 1371, 1382, 1385. Most significantly, he testified Hispanic drug dealers, in general, are "a lot more cautious" and require more trust before doing business together. 8/30 RP 1365-66. Again, the obvious purpose of this testimony

was to suggest that, because Javier and Alex are Hispanic, they needed to have a more trusting relationship before selling drugs together, and therefore must have known each other before the murders. This, in turn, bolstered the prosecution's case for accomplice liability.

Federal courts have condemned precisely this sort of "ethnic syllogism." Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 1008 (9th Cir. 2001); accord United States v. Nobari, 574 F.3d 1065, 1074 (9th Cir. 2009). The Ninth Circuit in Nobari recognized, even where "ethnic generalization testimony" may be relevant "to a small degree," any probative value is "substantially outweighed by the danger of unfair prejudice," because such testimony "encourage[s] the jury to convict the defendants on the basis of their membership in a particular ethnic group, rather than on the strength of the government's case." 574 F.3d at 1075.

Both explicit and implicit bias against individuals perceived to be Mexican immigrants persists in our justice system. Zamora, 199 Wn.2d at 723 (González, C.J., concurring).

Research bears this out. Implicit bias tests demonstrate White Americans significantly overestimate the proportion of crime committed by Latinx individuals. The Sentencing Project, Race and Punishment: Racial Perceptions and Crime and Support for Punitive Penalties, 13 (2014).[10] Implicit racial and ethnic bias persists even among individuals who have "explicitly disavowed prejudice." Id. Research has likewise demonstrated "significant" juror bias against Mexican American defendants when coupled with other perceived negative variables like socioeconomic status and crime stereotypicality. Russ Espinoza & Cynthia Willis-Esqueda, Defendant and Defense Attorney Characteristics and Their Effects on Juror Decision Making and Prejudice Against Mexican Americans, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 364, 367-68 (2008).

Here, the prosecution cloaked its appeal to jurors' potential ethnic biases in the guise of expert testimony about drug dealing.

[10] https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/ (last visited Sept. 9, 2022).

But there was no apparent purpose for the testimony about Mexican cartels and drug smuggling across the United States-Mexico border except to appeal to jurors' fears and concerns regarding illegal drugs in their own community. The Washington Supreme Court made clear in Zamora that these types of ethnicity-based appeals will not be tolerated.[11] 199 Wn.2d at 723. There is but one remedy and that is reversal of Alex's convictions. Id. at 722-23.

[11] This Court can also take judicial notice that this is not the Pierce County Prosecutor's Office first foray into race-based misconduct. Division Three in McKenzie recently noted at least three instances, including that case, where a Pierce County prosecuting attorney "utilized inflammatory stereotyping, leading to reversal of a conviction." 21 Wn. App. 2d at 733 (citing State v. Tarrer, No. 41347-7-II, 2013 WL 1337943 (Apr. 2, 2013), where the prosecution brought up the September 11 terrorist attacks and invoked patriotism during the trial of a Muslim man, and State v. Ellis, No. 53691-9-II, 2021 WL 3910557 (Aug. 31, 2021), where the prosecution referenced O.J. Simpson and negative racial stereotypes during the trial of a Black man accused of murdering his white girlfriend).

3. **Defense counsel was constitutionally ineffective for failing to object to inflammatory and wholly irrelevant evidence of Mexican cartels.**

Even if this Court does not agree the prosecution's deliberate introduction of irrelevant cartel evidence amounted to race-based misconduct, defense counsel was constitutionally ineffective for failing to object or move to exclude that same evidence. Well-established case law holds such evidence to be both inadmissible and highly prejudicial in cases like this one, where there was no evidence Alex belonged to a cartel and no indication the murders were cartel-related. There was no strategic reason for defense counsel's failure to prevent the jury from hearing such inflammatory, speculative evidence that closed major gaps in the prosecution's case. Reversal is necessary.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A defense attorney's

failure to object constitutes ineffective assistance where (1) the objection would likely have been sustained; (2) the failure was not a legitimate strategic decision; and (3) there is a reasonable probability the jury verdict would have been different with a proper objection. In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A "reasonable probability" is lower than a preponderance standard; it was one "sufficient to undermine confidence in the outcome." State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

The prosecution introduced cartel evidence multiple times during Alex's trial, largely without defense objection or a defense motion to exclude. Deputy Madrigal Mendoza testified at length about Mexican cartels and narcotics trafficking. 8/30 RP 1358, 1361-64. Detective Salmon testified Alex searched the internet for "Sinaloa Cartel Seattle" and "drug busts for Mexican cartels, arrest tied to Mexican drugs, things of that nature." 8/5 RP 886-87; Ex. 133, at 1-2. The prosecution also introduced, through

Alex's interview, his belief that Javier might belong to the Sinaloa Cartel. Ex. 21, at 59-60. The prosecution also repeatedly elicited testimony about Javier and Wilberth being from Sinaloa, though failed to establish Alex was also from Sinaloa. 8/4 RP 789; 8/9 RP 1079; 9/1 RP 1526.

The trial court would have (or should have) granted a defense motion to exclude or sustained a defense objection to the cartel evidence. Evidence of affiliation with an organization like a gang or a cartel is "highly prejudicial" and must therefore "be tightly constrained to comply with the Rules of Evidence." State v. DeLeon, 185 Wn.2d 478, 490, 374 P.3d 95 (2016); State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). Because gang or cartel membership can suggest an individual's propensity to engage in criminal activity, admission of such evidence is measured under the standards of ER 404(b). Scott, 151 Wn. App. at 526; State v. Mee, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012).

Specifically, gang evidence is not admissible unless the prosecution can establish the accused belongs to a gang. State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008). There must also "be a nexus between the crime and the gang before the trial court may find the evidence relevant." State v. Embry, 171 Wn. App. 714, 732, 287 P.3d 648 (2012). Evidence of gang membership may be admissible for motive, but only where there is "a connection between the gang's purposes or values and the offense committed." Scott, 151 Wn. App. at 527. "Generalized expert testimony on gangs, untethered to the specifics of the case on trial, is impermissible." State v. Mancilla, 197 Wn. App. 631, 644, 391 P.3d 507 (2017).

Given "its inherently prejudicial effect," courts closely scrutinize the probative value of gang-related evidence. Mee, 168 Wn. App. at 160. Where the prosecution fails to establish any of the above criteria, gang evidence is inadmissible. See, e.g., id. at 159 (generalized testimony about gang mores improperly admitted where no evidence established Mee's

adherence to those behaviors); Scott, 151 Wn. App. at 528 (gang evidence improperly admitted where it failed to show "joint gang affiliation" and, further, did not "connect to the expressed motive"); Ra, 144 Wn. App. at 702 (same, where "the State never presented evidence that Ra was a gang member and, if so, what the gang mores were").

Here, the prosecution did not produce even a scrap of evidence that Alex belonged to the Sinaloa Cartel or any other cartel. The prosecution could not even establish Alex was from the Sinaloa state of Mexico. 8/4 RP 789; 9/1 RP 1526. Nor did the prosecution make any connection between a cartel and the murders. While Alex told police he thought Javier might belong to the Sinaloa Cartel, the prosecution could not connect the cartel to any motive for killing Wilberth and Adrian. Ex. 21, at 59-60. Deputy Madrigal Mendoza gave generalized testimony about cartel mores related to drug trafficking. 8/30 RP 1361-64. But no one indicated Alex's adherence to those mores, either in selling drugs or in allegedly participating in the murders (and, of

course, Alex was not on trial for selling drugs). The cartel evidence failed every one of the prerequisites for admission. The evidence was therefore inadmissible, and the trial court would have erred in refusing to exclude it.

The next question is, then, where there was any legitimate strategy for defense counsel's failure to move to exclude all reference to cartels. The record makes plain there was not.

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Consequently, "if defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently." State v. Vazquez, 198 Wn.2d 239, 248, 494 P.3d 424 (2021). In Vazquez, for instance, our supreme court could find no reasonable strategy for defense counsel's failure to object to highly prejudicial, inadmissible ER 404(b) evidence. 198 Wn.2d at 258.

As established, the case law holds membership in a criminal enterprise like a gang or a cartel is inflammatory and not

admissible unless the evidence meets certain prerequisites, none of which were met here. State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009). Defense counsel had a duty to research this controlling law and move to exclude the harmful, inadmissible evidence.

Defense counsel appeared to recognize just how problematic the cartel evidence was. Before testimony began, he objected to evidence of Javier and Alex dealing drugs together. 7/22 RP 295. As part of that objection, he pointed out there was no evidence of "some initiation into a drug group or something like that." 7/22 RP 295. He emphasized "[t]here's absolutely no evidence, not even a scintilla of evidence that [the prosecution] can come up with that type of theory as to why [Javier] did what he did." 7/22 RP 295. Counsel maintained "[t]he only reason the State wants to bring this evidence forward is to raise a thought, oh, this is a step of initiation to get involved *in some type of drug cartel-type situation*. That's the only reason. *And that can be only prejudicial and will deny my client a fair trial*." 7/22 RP

296 (emphasis added). This objection, alone, demonstrates counsel had no strategic reason for not objecting to the rest of the cartel evidence. He understood the powerfully inflammatory nature of the evidence.

Defense counsel also later objected on relevance grounds to the prosecution's question of Dr. Carlson whether Alex told her that he was from Sinaloa.[12] 9/1 RP 1526. This further indicates that defense counsel understood the harmful nature of any suggested association between Alex and the Sinaloa Cartel.

Moreover, defense counsel did not advance any theory that the murders were cartel-related. 7/26 RP 434 (opening, Javier "committed two unexplained murders"); 9/8 RP 1857 (closing, "[t]hey haven't proven anything beyond a reasonable doubt, other than that Javier did the killings"). Defense counsel Alex's actions could be explained by his fear of Javier. 7/26 RP 444-45;

[12] The fact of the prosecution's question further supports Alex's claim of race-based misconduct, because the prosecution knew from Dr. Carlson's report that Alex was born in Los Angeles, California, and then lived most of his childhood in the Baja California region—not Sinaloa—of Mexico. CP 167.

9/8 RP 1837-39, 1843. At no time did counsel suggest this fear was driven by anyone or anything but Javier as an *individual*. 7/26 RP 446-47; 9/8 RP 1834-36. There was not even a hint from the defense that Alex may have been afraid of the Sinaloa Cartel or Javier's speculative association with the cartel. See 7/26 RP 434-50 (opening); 9/8 RP 1817-58 (closing). As a result, no reasonable strategy can explain defense counsel's failure to object or move to exclude any reference to cartels during trial.[13]

The remaining question is prejudice. Courts recognize gang evidence is "extremely prejudicial." Mee, 168 Wn. App. at 159. In particular, gang evidence can be "very significant" when the charged crime is based on a theory of accomplice liability,

[13] The only cartel reference defense counsel made during the entire trial was in opening statement, when counsel said Adrian played a song that is a "style of music in Mexico that kind of magnifies cartel and drug people." 7/26 RP 439. But counsel did not indicate playing this song gave Javier a motive for killing Adrian. 7/26 RP 439-41; see also DeLeon, 185 Wn.2d at 489 (expressing doubt that a person's musical taste might indicate gang membership).

because "[e]vidence of gang affiliation can be a basis for finding that multiple defendants were acting in concert." Scott, 151 Wn. App. at 529. Given that juries are apt to misuse improperly admitted gang evidence for its forbidden purpose—the accused's propensity for crime—courts reverse unless there is "overwhelming evidence" of guilt. Mee, 168 Wn. App. at 160.

There can be no real question the cartel evidence was prejudicial. The prosecution was unable to establish any motive for the murders. The prosecution also struggled to establish any connection between Javier and Alex—beyond Deputy Madrigal Mendoza's speculative testimony based on the purported characteristics of Hispanic drug dealers—that existed before the night of the murders. 8/4 RP 775-76; 8/5 RP 939-46. One could readily question why Alex would assist a man he just met in killing two individuals he had also just met—one of whom was his best friend's brother. Put simply, it made no sense. 9/8 RP 1840 (defense counsel making this point in closing).

Against this backdrop, the prosecution repeatedly and systematically elicited cartel evidence at trial. The cartel evidence supplied the missing motive and missing connection. It allowed the jury to speculate that Javier and Alex were associated through the cartel. It suggested they were acting in concert to further cartel purposes. It invited the jury to infer the murders were somehow related to the Sinaloa Cartel. This is particularly true, given the Sinaloa Cartel's reputation for violence. At least some of the jurors were likely familiar with the Sinaloa Cartel.[14]

[14] For instance, the famous Sinaloa Cartel leader, Joaquín "El Chapo" Guzmán, was sentenced to life without the possibility of parole in July of 2019 for multiple offenses ranging from drug trafficking to murder conspiracy. Bill Chappell, Mexican Drug Kingpin 'El Chapo' Is Sentenced to Life Plus 30 Years in U.S. Prison, NPR (July 17, 2019, 10:23 AM), https://www.npr.org/2019/07/17/742601114/el-chapo-is-sentenced-to-life-plus-30-years-in-prison-for-drug-crimes. In a press release, the U.S. Department of Justice emphasized Guzmán's trial finally allowed the public to see how he "used any means necessary to control his ruthless empire, including kidnapping, corruption, torture, and murder." Press Release, DEP'T OF JUST., Joaquin "El Chapo" Guzman, Sinaloa Cartel Leader, Sentenced to Life in Prison Plus 30 Years (July 17, 2019), https://www.justice.gov/opa/pr/joaquin-el-chapo-

It would not be any great leap for jurors to assume Alex acted in conformity with the cartel's mores.

Defense counsel should not have allowed the jury to hear such speculative, inflammatory evidence that closed major holes in the prosecution's case. The failure to request exclusion or to object at trial irreparably harmed Alex's defense and deprived him of his right to effective assistance of counsel. This Court should reverse Alex's convictions.

4. The trial court erred in admitting one of the victim's mother's emotional reaction to identifying Alex on surveillance video, which served no purpose except to prejudice the jury and indicate her opinion on guilt.

The trial court erred in admitting evidence, over defense objection, that Adrian's mother, Rosa, responded by screaming and crying when she identified Alex on surveillance video. The evidence served no purpose except to prejudice Alex by provoking an emotional response from jurors and suggesting

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guzman-sinaloa-cartel-leader-sentenced-life-prison-plus-30-years.

Rosa's opinion on Alex's guilt. Although defense counsel properly objected under ER 403, he did not object to the evidence as an impermissible opinion on guilt. Both the trial court's and defense counsel's errors necessitate a new trial.

Adrian's mother, Rosa, and his sister, Tania, identified Alex and Javier on surveillance video as they left the University Place scene where Javier killed Wilberth. 8/4 RP 745-46. Rosa knew Alex well, because Alex lived next door and was close friends with her younger son, Johann. 8/9 RP 986-87, 1009-10. After the murders, Alex accompanied Rosa to the scene, comforting her and telling her not to worry, "I know who did this." 8/9 RP 995-97.

Before trial, the prosecution sought to admit not only Rosa's identification of Alex, but also her emotional response to seeing him on the surveillance video. CP 421; 7/20 RP 28-29. The prosecution argued Rosa's demeanor was admissible as an excited utterance. CP 421; 7/20 RP 29. The prosecution claimed Rosa's emotional reaction was relevant as "evidence of guilt,"

because "it's the first time she understands that he was present during the incident." 7/20 RP 32.

Defense counsel did not object to the fact of Rosa's identification, which was admissible under ER 801(d)(1)(iii). 7/20 RP 30. But he objected to evidence of Rosa screaming and crying upon seeing Alex as both irrelevant and overly prejudicial. 7/20 RP 29-33. Counsel emphasized the purpose of the evidence was solely "to drum up some sort of emotional response with the jurors," 7/20 RP 32, maintaining, "it's just playing with the emotions of the jury," 7/20 RP 33.

The trial court admitted both the identification and Rosa's emotional response. 7/20 RP 33. The court reasoned "[i]t's more probative than it is prejudicial" and "[i]t is directly relevant to proving consciousness of guilt." 7/20 RP 33. In a written ruling, the court reiterated Rosa's reaction was relevant "because she could not believe it was Lopez Leon she was seeing on the video." CP 69. Having lost the motion in limine, defense

counsel did not need to object again at trial. State v. Powell, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995).

At trial, the prosecution introduced Rosa's emotional reaction through two different witnesses. Detective Jessica Whitehead testified Rosa and Tania identified Javier and Alex on the video. 8/4 RP 745. The prosecution then inquired, "And could you describe to the jury the demeanor of either Rosa or Tania when they were shown this video[?]" 8/4 RP 745. Even though he did not need to, defense counsel objected again, reiterating "[t]he question about their demeanor is irrelevant." 8/4 RP 745. The court instructed the prosecution to rephrase. 8/4 745. The prosecution then asked, "did either of them react to seeing the video?" 8/4 RP 745. Detective Whitehead responded, "Yes. They were upset, but Rosa started crying. She was visibly upset." 8/4 RP 745. Detective Whitehead went on to explain Rosa was upset because she was previously unaware Alex was involved. 8/4 RP 746.

The next day, outside the presence of the jury, the prosecution addressed defense counsel's demeanor objection. 8/5 RP 969-70. The prosecution claimed the case law is "uncontroverted that demeanor, which goes to observation of witnesses, that demeanor is admissible." 8/5 RP 969-70. For this proposition, the prosecution cited State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), and State v. Aguirre, 168 Wn.2d 350, 229 P.3d 669 (2010). 8/5 RP 970. The trial court again ruled the demeanor evidence was "entirely appropriate." 8/5 RP 971.

Apparently not content with just one description of Rosa's emotional reaction, the prosecution elicited the same testimony through Detective Sergeant Jason LaLiberte:

> Q. And what, if any, reaction -- physical reaction, I mean -- did Rosa have as you played this video for her?
>
> A. She was very excited. She put her hands to her face and made some explanations.
>
> Q. All right. What was -- did she cry or yell or anything of that nature?
>
> A. Yes.

Q. What specifically?

A. She cried and she yelled that -- she identified the person in the video.

9/7 (a.m.) RP 33-34.

Evidentiary rulings are reviewed for abuse of discretion. State v. Ramirez-Estevez, 164 Wn. App. 284, 289, 263 P.3d 1257 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Id.

The trial court abused its discretion in admitting Rosa's reaction to identifying Alex. Defense counsel was correct the evidence served no purpose except to elicit an emotional response from the jury, making it inadmissible under ER 403. The court's reasoning that the evidence was relevant to "consciousness of guilt" falls flat because it effectively acknowledges the evidence conveyed to the jury Rosa's opinion that Alex was guilty.

Whether the evidence met the excited utterance exception to the hearsay rule is neither here nor there. All evidence is still

subject to the confines of ER 403. ER 403 provides that even relevant, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The "linchpin word" of ER 403 is "'unfair.'" State v. Bernson, 40 Wn. App. 729, 736, 700 P.2d 758 (1985). "'[U]nfair prejudice' is that which is more likely to arouse an emotional response than a rational decision by the jury." State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). It means "an undue tendency to suggest a decision on an improper basis—commonly an emotional one." Id.

That was precisely the aim of introducing Rosa's emotional reaction to identifying Alex. Critically, her identification was not in dispute. Alex admitted he was in the vehicle with Javier and left the scene with him. The fact that Rosa cried and screamed when she saw Alex served no purpose except to evoke the jury's sympathies and suggest Rosa's opinion that Alex must be guilty.

The case law cited by the prosecution, addressing the demeanor of the defendant or complaining witness, is inapplicable. See, e.g., Aguirre, 168 Wn.2d at 360 (victim's demeanor); Rafay, 168 Wn. App. at 807 (defendant's behavior). The Aguirre court held testimony regarding the *complaining witness's* demeanor "was likely helpful to the jury in evaluating for themselves whether the victim had in fact been assaulted and raped." 168 Wn.2d at 360. Courts have similarly recognized testimony regarding the *defendant's* appearance and behavior may allow the jury to draw "inferences as to a defendant's mental processes." State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662 (1989).

A fact witness's emotional response does not fall under the same rubric. This Court's decision in State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), makes this clear. In that case, Johnson was accused of child molestation for an ongoing sexual relationship with T.W. Id. at 927-28. At trial, several witnesses testified about Johnson's wife Stacy's emotional reaction upon

hearing T.W.'s allegations, explaining Stacy was "hysterical," "freaked out," and attempted suicide several hours later. Id. at 931-33.

The Johnson court condemned this testimony on multiple grounds. The first problem with the testimony was "Stacy's opinion itself was entirely collateral." Id. at 933. Second, the testimony "sheds little or no light on any witness's credibility or on evidence properly before the jury and really tells us only what Stacy believed—and the other witnesses thought Stacy believed—about TW's accusations." Id. Finally, evidence of Stacy's reaction was "highly prejudicial: Johnson's own wife believed the accusations." Id. This Court therefore held the evidence "was clearly more prejudicial than probative under ER 403." Id. The "inadmissible testimony served no purpose except to prejudice the defendant," by suggesting "Johnson's wife believed TW's allegations." Id. at 934.

Johnson controls. Rosa's emotional response was entirely collateral to the fact of her identification. It served no purpose

except to evoke sympathy and indicate to the jury that Rosa believed Alex participated in the murder of her son. Indeed, the prosecution sought to admit it and the trial court did admit it for that very purpose. 7/20 RP 32-33. Johnson holds such evidence is highly prejudicial, with minimal probative value, and is therefore inadmissible under ER 403.

The Johnson court also recognized such testimony amounts to an improper opinion on guilt, violating the accused's right to have factual questions decided by the jury. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). No witness, lay or expert, "may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." Black, 109 Wn.2d at 348.

Defense counsel but did not explicitly object to Rosa's testimony as an improper opinion on guilt. To the extent this failing constitutes a waiver of the issue, counsel performed deficiently. Counsel clearly did not want evidence of Rosa's

emotional response admitted, objecting to it as irrelevant and unfairly prejudicial before trial, and again when Detective Whitehead testified. 7/20 RP 29-33; 8/4 RP 745. Johnson holds such evidence is inadmissible both because it is unfairly prejudicial and because it is a prohibited opinion on guilt. Defense counsel performs deficiently by "failing to recognize and cite the appropriate case law." State v. Adamy, 151 Wn. App. 583, 588, 213 P.3d 627 (2009). Counsel's failure to recognize the additional basis for exclusion was therefore unreasonable.

The remaining question is prejudice. The same standard applies whether assessing evidentiary error or ineffective assistance of counsel. That is, reversal is required when there is a reasonable probability the error affected the outcome of the trial. Estes, 188 Wn.2d at 458; State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

For the same reasons that Rosa's emotional reaction to identifying Alex should not have been admitted, there is a reasonable probability it prejudiced the outcome of Alex's trial.

Of all the prosecution's witnesses, no one knew Alex well except for Rosa. See, e.g., 8/9 RP 1039-40 (Elizabeth Ulloa, wife of Adrian, did not know Alex), 1070 (Wilberto Yanez Rojo, roommate of Wilberth, did not know Alex), 1097 (America Ceras Aparicio, roommate of Wilberth, had seen Alex around the apartment complex only a few times). Rosa's opinion of Alex and his involvement mattered. Johnson demonstrates a friend or family member's opinion on guilt is highly prejudicial and not easily disregarded. See also State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) (mother's opinion of her children's veracity).

Furthermore, the prosecution made sure to elicit the prejudicial evidence not once, but twice. 8/4 RP 745-46; 9/7 (a.m.) RP 33-34. There was no reason for this except to prejudice Alex in a close case. Courts recognize the repetition of improper evidence gives it a "cumulative effect." Jerrels, 83 Wn. App. at 508. The jury needed to decide the case based on properly admitted evidence, not its sympathy for Rosa or her belief that

Alex was guilty. There is a reasonable probability that twice emphasizing Rosa's emotional reaction upon identifying Alex made it more difficult for the jury to carry out its duty. This Court should therefore reverse Alex's convictions and remand for a new trial. Johnson, 152 Wn. App. at 937.

5. **Prosecutorial misconduct in rebuttal argument, suggesting an entirely new and unsupported theory of complicity, denied Alex his right to a fair trial.**

Close to the end of rebuttal argument, the prosecution went on at length about a purported agreement between Javier and Alex that Javier would "take the fall" for Alex by admitting guilt if they were caught. No evidence of any such agreement was introduced at trial. The prosecution's reference to facts not in evidence was plainly improper, particularly where it suggested the otherwise lacking evidence of Alex's complicity. This misconduct necessitates reversal, as does defense counsel's unreasonable failure to object and prevent jurors from hearing

such prejudicial argument right before they began their deliberations.

a. *The prosecution engaged in blatant misconduct by urging the jury to decide the case based on facts not in evidence.*

Prosecutors are officers of the court and have a duty to ensure an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); Monday, 171 Wn.2d at 676. Prosecutors also have a special duty to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). "[W]hile [they] may strike hard blows, [they are] not at liberty to strike foul ones." Berger, 295 U.S. at 88.

Consistent with these duties, prosecutors have "some latitude to argue facts and inferences from the evidence," but "are not permitted to make prejudicial statements unsupported by the record." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). It is therefore misconduct for a prosecutor to "suggest that evidence not presented at trial provides additional grounds

for finding a defendant guilty." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); accord State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) ("[A] prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.").

There is good reason prosecutors are prohibited from referring to facts not in evidence. Our state supreme court has explained:

> The prosecutor's argument is likely to have significant persuasive force with the jury. Accordingly, the scope of argument must be consistent with the evidence and marked by the fairness that should characterize all of the prosecutor's conduct. Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012) (quoting AM. BAR ASS'N, Standards for Criminal Justice std. 3-5.8 (2d ed. 1980)).

Here, the prosecution engaged in precisely this kind of forbidden conduct during rebuttal. The prosecution fabricated a prior agreement between Javier and Alex, as a way to try to explain Javier's admission to shooting both Adrian and Wilberth. Javier's admission was a problem for the prosecution because the prosecution theorized Alex might have used a second gun to shoot Wilberth. 9/8 RP 1797-99. The prosecution was left trying to undermine the credibility of Javier's guilty plea, despite stipulating to its admissibility. 9/8 RP 1878; CP 539-44. The prosecution rightly queried, "if Javier did not shoot both victims and the defendant actually shot one of the victims, why in the world would Javier ever adopt a statement saying that he shot both victims?" 9/8 RP 1878-79.

In an attempt to answer this question, the prosecution recalled Alex's statements during his police interview that, if Javier fled to Mexico, "'it's all fucked up, there's no way I'm going to be able to prove that I didn't know him beforehand, you know; so I'm pretty much fucked.'" 9/8 RP 1879 (quoting Ex.

21, at 48). The prosecution emphasized Alex's statement later in his interview, "'what I'm scared is that he's probably -- what if he goes, goes to Mexico, when I have to face the music for plates I didn't even break.'" 9/8 RP 1879 (quoting Ex. 21, at 83).

Soon thereafter, the prosecution began its embellishment, based on no evidentiary support whatsoever:

> But you know why he would be effed if Javier flees to Mexico? If they had an agreement that if something came up and the defendant was arrested, that Javier would take the fall for both, that Javier would say he was the one who shot both victims. That -- if they had an agreement, but Javier did not keep his agreement and Javier flees to Mexico, yes, the defendant, he's right, he would be "effed," and that's what he's worried by.

9/8 RP 1880. The prosecution continued with this argument:

> Well, ladies and gentlemen, let's think about this: How do you get a stranger that you just met only hours before the killing, hours before the hit, how do you get that stranger to be your accomplice? How do you get that person to agree to help you? One possible way, I submit to you, is you assure that person nothing bad is going to happen to you. If you help me, nothing will happen to you, because you know what? If we ever get caught, I'm going to take the fall for both. I'm going to say I did both of the shootings, both of the killings.

9/8 RP 1880-81. The prosecution's rank speculation about some purported agreement that Javier would "take the fall" for Alex did not end there:

> And the defendant, what could motivate the defendant? What could Javier have possibly said other than, Hey, I'll take the fall if anything happens? What could have motivated him to say, Yeah, I'll agree – I'll agree to be -- I will be in the car. So you don't have to be alone, I'll agree to be in the car, be ready to assist.

9/8 RP 1882-83. The prosecution concluded its rebuttal argument not long thereafter. 9/8 RP 1888.

There is no evidence in the record that there was any type of agreement before, during, or after the killings that Javier would take the fall for Alex by admitting to being the shooter if they were caught. Though the prosecution relied on Alex's interview, Alex said nothing of an agreement during that interview. He maintained he did not know of any plan by Javier to kill Adrian and Wilberth; "We didn't plan to do anything. He never said anything about none of, none of what happened." Ex. 21, at 22,

29. It strains logic to even conceive of an inference that could be drawn from Alex's interview that might allow for the prosecution to argue the existence of such an agreement.

Jones provides an apt analogy. There, the prosecution argued the police would suffer professional repercussions if they used an untrustworthy confidential informant (CI) and would not have used the informant if they doubted him. Jones, 144 Wn. App. at 293. The prosecution further claimed police use the same informants repeatedly because they are reliable and trustworthy. Id. at 294. The Jones court held these remarks improper because "Officer Elliott, who described the CI's role and history, said nothing about his credibility or trustworthiness." Id. The prosecution inappropriately "sought to bolster the CI's and Elliott's credibility based on highly prejudicial 'facts' that were not in evidence." Id. The court found that this and other misconduct was "so prejudicial that curative instructions would be ineffective." Id.

The prosecution in Alex's case faced a dearth of evidence regarding any prior relationship or agreement between Javier and Alex. Like in Jones, the prosecution attempted to shore up this lack of evidence by speculating that Javier promised to take the fall for Alex in exchange for Alex's help. The prosecution in Jones needed to bolster the CI's credibility, but without evidence to do so. Here, the prosecution needed to undermine Javier's admission of guilt, but without evidence to do so. The prosecution therefore invented an agreement between Javier and Alex. There can be no real question the prosecution's lengthy discussion of facts not in evidence was misconduct. Pierce, 169 Wn. App. at 555 (holding prosecutor's fabricated tale of final interaction between defendant and the victims to be misconduct).

Defense counsel did not object to the prosecution's speculative argument. 9/8 RP 1880-83. Where defense counsel does not object, the error is typically deemed waived, "unless the prosecutor's misconduct was so flagrant and ill intentioned that

an instruction could not have cured the resulting prejudice." State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

This standard, though a high one, is met here, given how weak the prosecution's case was. As discussed, there was no evidence of any agreement between Javier and Alex. The prosecution was left trying to argue the fact that Alex survived demonstrated his complicity in the murders. 9/8 RP 1801, 1812. This, of course, could hardly be squared with the law of accomplice liability that "more than mere presence and knowledge of criminal activity of another must be shown to establish that a person present is an accomplice." CP 104.

Then, for the first time in rebuttal, the prosecution indicated there might, in fact, have been a preexisting agreement. Our own supreme court has recognized the problem with this kind of extra-factual impropriety: it indicates the prosecution possesses additional evidence the jury did not get to hear. Glasmann, 175 Wn.2d at 706. The prosecution essentially throws the prestige of its office behind the speculation, suggesting to the

jury that it should be believed.[15] Id. Additional prejudice results when the improper remarks come near the end of rebuttal—as they did here—just before the jury begins its deliberations. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

An objection might have stopped the prosecution's lengthy speculation about an agreement that Javier would "take the fall" for Alex. But the seed would have already been planted in jurors' minds. This is a classic example where "[t]he bell once rung cannot be unrung." State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1977). To put it bluntly, "if you throw a skunk into the jury box, you can't instruct the jury not to smell it." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

Under the circumstances, no curative instruction could have erased the prejudice that resulted from the prosecution's

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[15] See also State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) ("'Because the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant.'" (alteration in original) (quoting United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)).

suggestion that Javier agreed to take the fall for Alex in exchange for his participation. The prosecution, simply put, did not have that evidence. It did not get to create that "evidence" on rebuttal, without any opportunity for the defense to address it. The flagrant and ill-intentioned reference to facts not in evidence necessitates reversal. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994) ("[I]f the misconduct cannot be remedied and is material to the outcome of the trial, the defendant has been denied his due process right to a fair trial.").

b. *There was no reasonable strategy for defense counsel's failure to object to the prosecutor's obviously improper and prejudicial remarks.*

Even if this Court is not inclined to reverse without a timely objection by defense counsel, it should reverse under the standard applicable to ineffective assistance of counsel. See In re Pers. Restraint of Lui, 188 Wn.2d 525, 560-62, 397 P.3d 90 (2017) (failure to object to prosecutorial misconduct in closing assessed under standards for ineffective assistance); State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (same).

The constitutional right of the accused to effective assistance of counsel is violated when (1) defense counsel's performance was deficient and (2) that deficiency prejudiced the accused. Vazquez, 198 Wn.2d at 247-48.

Although an attorney's decisions are given deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

"[T]he difficulty of proving flagrant and ill intentioned misconduct emphasizes the magnitude of defense counsel's responsibility to protect their clients' right to a fair trial and the consequences for their clients when counsel fails to act." Loughbom, 196 Wn.2d at 74. Washington courts have therefore recognized, time and again, that defense counsel has the "duty to object to a prosecutor's allegedly improper argument." Emery,

174 Wn.2d at 761; accord State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995) ("[D]efense counsel should be aware of the law and make timely objection when the prosecutor crosses the line."). Objections are particularly important "to prevent counsel from making additional improper remarks[.]" Emery, 174 Wn.2d at 762.

In closing, defense counsel indicated a reason for his infrequent objections during trial: "All of the evidence, did you see the defense object once? We didn't object to anything because it's clear we knew that Javier did the killing. The State knows that Javier did the killing." 9/8 RP 1832. This may have been a reasonable choice for witness testimony, with the opportunity for cross-examination and closing argument. But it was not a reasonable choice for rebuttal argument, where there would be no more opportunity to respond.

As discussed, rebuttal argument is the last thing the jury hears before commencing their deliberations. Lindsay, 180 Wn.2d at 443. Without an objection from defense counsel, the

prosecution was allowed to go on at length about the speculative agreement between Javier and Alex. The lack of objection meant the defense had no way to contest the prosecution's new claim. The purported agreement suggested complicity the prosecution was otherwise missing. Defense counsel's failure to object, in turn, implied to the jury that there was nothing wrong with the argument. State v. O'Neal, No. 50796-0-II, 2021 WL 5085417, at *8 (Nov. 2, 2021) (unpublished). There was no legitimate strategy for allowing the jury to hear such prejudicial "facts" not in evidence right before they began deliberating on Alex's guilt.

The prejudice standard is easily met, for the same reasons that the misconduct could not be remedied by a curative instruction. Javier admitted to shooting both Adrian and Wilberth. 9/1 RP 1468-70. All the evidence actually introduced at trial established Javier and Alex met just hours before the murders. 8/4 RP 775-76; 8/5 RP 940-46. Taken together, this was persuasive evidence that Alex was telling the truth—he did

not know Javier planned to murder Adrian and Wilberth, and he did not participate in the murders.

The evidence undoubtedly left jurors questioning why Alex might assist a person he did not know in carrying out a brutal double homicide. At the eleventh hour, the prosecution finally concocted an explanation: Javier promised to take the fall for Alex if they were caught. This served two critical purposes, to undercut Javier's admission of guilt and to bolster the prosecution's claim of complicity. The jury must have wondered, why would the prosecutor make such an argument if she did not know or believe it to be true? Courts recognize trained and experienced prosecutors do not toy with the threat of appellate reversal unless they believe such tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996). In a close case like this one, the improper remarks mattered.

Defense counsel's unreasonable failure to object allowed the jury to hear a new, unsupported theory of complicity right

before beginning their deliberations. On this additional basis, Alex's convictions should be reversed. O'Neal, 2021 WL 5085417, at *8 (holding defense counsel's failure to object to be both deficient and prejudicial, where the prosecutor's improper remarks "directly obfuscated" the defense theory and many were made in rebuttal, leaving the defense with "no opportunity to respond").

6. **The trial court erred in refusing to investigate the alleged introduction of extraneous evidence into jury deliberations, necessitating remand for an evidentiary hearing.**

The defense alleged Juror 8 introduced highly specialized knowledge into deliberations by evaluating Alex's lip movement and speech pattern in his police interview. If true, introduction of this extraneous, untested expert testimony constituted juror misconduct that would necessitate a new trial. The trial court erred in concluding the misconduct inhered in the verdict and, as a result, refusing to hold an evidentiary hearing to allow the

defense to prove the allegations. Remand for that evidentiary hearing is the appropriate remedy.

The constitutional guarantee to trial by jury "means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." In re Det. of Broten, 130 Wn. App. 326, 336, 122 P.3d 942 (2005). Juror use of novel or extrinsic evidence is misconduct. State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994). "[A] jury, in exercising its collective wisdom, is expected to bring its opinions, insights, common sense, and everyday life experience into deliberations." State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). A juror may not, however, introduce "highly specialized" knowledge into deliberations. Id. "Such evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal." Balisok, 123 Wn.2d at 118. "A jury's exposure to extrinsic evidence deprives a defendant of the rights to confrontation, cross-examination, and assistance of counsel embodied in the

Sixth Amendment." Raley v. Ylst, 470 F.3d 792, 803 (9th Cir. 2006).

Juror misconduct requires a new trial if there are "reasonable grounds to believe the defendant has been prejudiced." Briggs, 55 Wn. App. at 55; see also CrR 7.5(a)(2). "This is an objective inquiry into whether the extraneous evidence could have affected the jury's determinations and not a subjective inquiry into the actual effect of the evidence on the jury because the actual effect of the evidence inheres in the verdict." Briggs, 55 Wn. App. at 55. Put another way, "[i]t is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court will determine what was the probable effect upon the verdict." Halverson v. Anderson, 82 Wn.2d 746, 749, 513 P.2d 827 (1973).

The remedy for an allegation of juror misconduct is an evidentiary hearing at which the accused has the opportunity to prove the misconduct. Smith v. Phillips, 455 U.S. 209, 215, 102

S. Ct. 940, 71 L. Ed. 2d 78 (1982). A trial court's decision on whether to investigate juror misconduct is reviewed for abuse of discretion. State v. Hill, 19 Wn. App. 2d 333, 345, 495 P.3d 282 (2021), review denied, 199 Wn.2d 1011 (2022).

The issue here hinges on whether Juror 8 introduced extraneous evidence—i.e., highly specialized knowledge—into deliberations. Analogous case law demonstrates that she did.

Halverson, for example, involved a minor injured in a car crash who sued for future lost wages. 82 Wn.2d at 747. The minor testified he wanted to become an airline pilot but could not because of his injuries. Id. Instead, he was pursuing a career as a surveyor and was likely to earn less. Id. But the minor failed to introduce evidence regarding salaries in those professions. Id. After trial, the court learned a juror supplied the jury with information about the earnings of airline pilots versus surveyors. Id. The Washington Supreme Court affirmed the trial court's decision to order a new trial, reasoning the evidence introduced by the juror was akin to untested expert testimony. Id. at 752;

accord Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. 904, 907, 720 P.2d 845 (1986) (juror introduced extrinsic evidence akin to expert testimony when he shared what an attorney told him about likely damages for a similar injury).

Briggs involved a similar issue of juror misconduct. There, the prosecution accused Briggs of committing a series of sexual assaults. 55 Wn. App. at 46. The principal defense theory was none of the victims ever noted their attacker had a stutter, but Briggs had a profound stutter. Id. A juror, who did not disclose during voir dire that he had a speech impediment, discussed his own experience with speech hesitation during deliberations. Id. at 47-49. The juror explained how he could overcome his speech production problem and suggested to the jury that Briggs might have used the same techniques. Id. at 49.

The court of appeals recognized jurors are expected to bring their life experiences to bear in deliberations. Id. at 58. However, the information related by the juror "was of a different character." Id. The court held it was "highly specialized, as

evidenced by the fact that the topic was the subject of expert testimony by a prosecution witness." Id. The court concluded the untested evidence was "outside the realm of a typical juror's general life experience and therefore should not have been introduced into the jury's deliberations." Id. at 59.

The alleged misconduct in Alex's case is akin to that in Halverson and Briggs. The defense alleged Juror 8, a self-identified speech pathologist, introduced extraneous evidence into deliberations. CP 139-42. She evaluated Alex's lip movement and speech pattern during his police interview, showing other jurors how Alex apparently said "*we* did it" rather than "*he* did it." CP 141-42. If true, this is highly specialized knowledge like that in Briggs. Indeed, in Briggs, a speech pathologist testified as an expert. 55 Wn. App. at 49.

Proficient lip reading requires training and practice, and is not within the average juror's everyday life experience. Nicholas Altieri et al., Some Normative Data on Lip-Reading Skills, 130 J. ACOUST. SOC. AM. 1, 3 (2011) (study of lip-reading by hearing

college students demonstrated average word-recognition accuracy scores "barely greater" than 10 percent; score of 30 percent correct "considered an outlier"). This is highlighted by the fact that no one else —not the detectives, not the prosecution, not the individual who transcribed Alex's interview, and no other jurors without Juror 8's aid—identified that Alex's mouth supposedly formed a "w" rather than an "h." Juror 8 effectively testified as an expert, without any opportunity for the defense to cross-examine her or rebut her claims.

The prosecution will likely emphasize that, in Briggs, the juror made a material nondisclosure in voir dire by failing to inform the parties of his speech impediment. By contrast, Juror 8 told the parties during jury selection that she was a "speech-language pathologist for the elementary schools" in the Peninsula School District. 7/22 RP 318; CP 533, 538 (Juror 28 became Juror 8).

Several cases have found no juror misconduct where the juror's background was identified in jury selection. For instance,

in Breckenridge, the parties knew a juror's wife suffered from migraines in a case involving a lawsuit against a doctor for negligently diagnosing a migraine. Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 201, 75 P.3d 944 (2003); accord Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 269, 796 P.2d 737 (1990) (juror disclosed her medical training in a medical malpractice lawsuit). Likewise, in Long, the parties knew a juror was a retired navy member and avid boater in a case involving the question of whether a person with a prosthetic leg could work as a deckhand. Long v. Brusco Tug & Barge, Inc., 185 Wn.2d 127, 134, 368 P.3d 478 (2016).

In each of these cases, though, the juror disclosed (or failed to disclose, as in Briggs) experience *material* to a central issue. This is a critical distinction because it allowed the parties to use their peremptory challenges "to avoid jurors whose experience would give them excess influence." Grotemeyer v. Hickman, 393 F.3d 871, 878 (9th Cir. 2004). The parties knew the jurors'

relevant experiences and chose to let them remain on the jury. Richards, 59 Wn. App. at 274.

By contrast, Juror 8's experience as a speech pathologist was not material to any disputed issues in Alex's case. The parties agreed on the transcript of Alex's interview—which nowhere said "we did it"—and the jury was allowed to read that transcript as the video played. 8/4 RP 761-64; Ex. 21. The defense could hardly have anticipated Juror 8 would exert "excess influence" in deliberations based on her specialized training. While there was no material *nondisclosure*, as in Briggs, nor was there a *material* disclosure, as in Breckenridge and the other cases discussed above. Alex therefore cannot be faulted for Juror 8 introducing extraneous evidence into deliberations.

Finally, Juror 8's alleged misconduct does not inhere in the verdict. As the Washington Supreme Court recognized in Halverson, her "statement was an act capable of objective proof without probing into the juror's mental process." 82 Wn.2d at

751. It is true that some of the defense investigator's declaration inhered in the verdict. For instance, the defense investigator relayed Juror 10's opinion that the difference between "we" and "he" in Alex's interview "'was a big thing,' in helping the jury reach its verdicts." CP 142; Long, 185 Wn.2d at 131-32 (recognizing matters that inhere in the verdict include "facts touching on the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence"). But the trial court and this Court are empowered to "entirely discard those portions [of the affidavit] which may tend to impeach the verdict of the jurors, and consider only those facts stated in relation to misconduct of the juror, and which in no way inhere in the verdict itself." Halverson, 82 Wn.2d at 749.

The trial court therefore erred in concluding the entire allegation of juror misconduct inhered in the verdict. 10/15 RP 2. The court abused its discretion in refusing to allow any further

investigation into the alleged misconduct. This Court should remand for an evidentiary hearing on the matter. United States v. Hendrix, 549 F.2d 1225, 1228-29 (9th Cir. 1977) (recognizing evidentiary hearing on juror misconduct serves two purposes: (1) to determine the truthfulness of the allegations and (2) to evaluate whether the misconduct prejudiced the defendant).

7. Cumulative error denied Alex his due process right to a fair trial.

Even if, standing alone, the above errors do not warrant reversal, their cumulative effect does. Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn2.d 772, 789, 684 P.2d 668 (1984). The doctrine applies "even where any one of the errors, taken individually, would be harmless." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014).

The doctrine applies here. The prosecution's evidence was far from overwhelming, indicating little more than Alex's

presence during the murders. The erroneously admitted evidence and repeated misconduct, along with defense counsel's multiple failures to object, served to undermine Alex's defense and suggest otherwise missing complicity. Under the circumstances, the cumulative prejudicial effect of these errors necessitates reversal.

8. Resentencing is necessary where the trial court failed to recognize its authority to impose concurrent sentences for multiple serious violent offenses.

The trial court failed to recognize its authority under RCW 9.94A.535(1)(g) to impose concurrent, rather than consecutive, sentences for multiple serious violent offenses. Clear authority from our state supreme court holds this failure constitutes a fundamental defect in the sentence. Remand for resentencing is necessary, where the trial court twice emphasized its lack of discretion and lamented the resulting lengthy sentence was "tragic."

"[E]very defendant is entitled to have an exceptional sentence actually considered." State v. McFarland, 189 Wn.2d 47, 56, 399 P.3d 1106 (2017). A sentencing court therefore errs "when it operates under the 'mistaken belief that it did not have the discretion to impose a mitigated exceptional sentence for which [a defendant] may have been eligible.'" Id. (alteration in original) (quoting In re Pers. Restraint of Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007)). "[A]n erroneous sentence, imposed without due consideration of an authorized mitigated sentence, constitutes a 'fundamental defect' resulting in a miscarriage of justice." Id. at 58 (quoting Mulholland, 161 Wn.2d at 332).

Both of Alex's convictions are classified as serious violent offenses. RCW 9.94A.030(46). RCW 9.94A.589(1)(b) mandates that sentences for multiple serious violent offenses arising from separate and distinct criminal conduct "shall be served consecutively to each other." However, the trial court has authority to order serious violent offenses to run *concurrently* as an exceptional sentence downward if "[t]he operation of the

multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g); State v. Graham, 181 Wn.2d 878, 887, 337 P.3d 319 (2014).

Mulholland is directly on point here. There, Mulholland was convicted of six counts of first degree assault, which is a serious violent offense. 161 Wn.2d at 326. The sentencing court rejected Mulholland's same criminal conduct argument because the assaults involved different victims. Id. Believing it had no discretion to do otherwise, the sentencing court then imposed consecutive sentences for the assaults under RCW 9.94A.589(1)(b). The Washington Supreme Court held the court's failure to recognize its authority to impose concurrent sentences for serious violent offenses was a "fundamental defect" in Mulholland's sentence. 161 Wn.2d at 333.

The supreme court reaffirmed the holding of Mulholland in Graham, emphasizing "a sentencing judge may invoke

.535(1)(g) to impose exceptional sentences . . . for multiple serious violent offenses under .589(1)(b)." Graham, 181 Wn.2d at 885; see also McFarland, 189 Wn.2d at 55 (extending Mulholland to presumptively consecutive firearm-related offenses under RCW 9.94A.589(1)(c)). The Graham court explained "concurrent sentences are sometimes necessary to remedy injustices caused by the mechanical application of grids and ranges." 181 Wn.2d at 885. The court noted sentencing judges should examine the seven policy goals enumerated by the legislature in RCW 9.94A.010 "when imposing an exceptional sentence under .535(1)(g)." Id. at 886.

Here, like the sentencing courts in Mulholland and Graham, the court did not recognize its discretion to run Alex's sentences concurrently under RCW 9.94A.535(1)(g). Defense counsel asked for a mitigated sentence based solely on Alex's youthfulness at the time of the offenses. CP 162-65; 11/19 RP 11-15. Neither of the parties identified RCW 9.94A.535(1)(g) as an alternative basis for a mitigated sentence or brought

Mulholland to the court's attention.[16] See CP 162-65; 11/19 RP 11-15 (defense sentencing arguments); CP 653-70; 11/19 RP 4-11 (state sentencing arguments).

After rejecting a mitigated sentenced based on youthfulness, the trial court announced the legislature "has removed discretion" to impose concurrent sentences for "serious violent offenses that are not the same course of conduct." 11/19 RP 18-19. The court reiterated "the sentences must be served consecutively." 11/19 RP 19. The court did not mention Mulholland or any discretion under RCW 9.94A.535(1)(g) to depart from the harsh multiple offense policy. See 11/19 RP 16-

[16] In both Mulholland and McFarland, the defendants alternatively argued their attorneys were ineffective for failing to alert to the court to its discretion under RCW 9.94A.535(1)(g). But neither court reached this claim, because the erroneous sentences constituted a fundamental defect. The McFarland court explained appellate courts have authority "to address arguments belatedly raised when necessary to produce a just resolution." 189 Wn.2d at 57. This is just such an issue "because of the central importance of ensuring appropriate, consistent sentences." Id. Alex therefore does not raise an alternative ineffective assistance claim, given this clear pronouncement by the Washington Supreme Court.

20. The record is clear: once the court rejected youthfulness as a mitigating factor, it believed it had no authority to impose anything other than consecutive sentences.

Remand for resentencing is necessary where record suggests "at least the possibility" that the sentencing court would have considered imposing concurrent sentences "had it properly understood its discretion to do so." McFarland, 189 Wn.2d at 59. The record need not show with "certainty" that the sentencing court would have imposed a mitigated exceptional sentence. Mulholland, 161 Wn.2d at 334.

This standard was met in Mulholland, where the sentencing court noted its lack of discretion and expressed sympathy towards Mulholland because of his former military service. Id. at 333-34. It was also met in McFarland, where the court indicated some discomfort with its apparent lack of discretion even though it did not indicate the same level of sympathy as in Mulholland. McFarland, 189 Wn.2d at 58.

The standard is likewise in Alex's case. The sentencing court twice emphasized its perceived lack of discretion. 11/19 RP 18-19. And, although the court rejected youthfulness as a mitigator, the court also did not adopt the prosecution's recommended mid-range sentence, instead imposing a sentence closer to the low end of the standard range. 11/19 RP 9, 19. The court expressed sympathy for Alex, who "himself is struggling," as well as Alex's family, who "suffers as well." 11/19 RP 17. The court recognized Adrian's and Wilberth's deaths were tragic, but recognized, too, that "sending a man to prison for 44 years is also tragic." 11/19 RP 20.

It is also relevant to note Alex's co-defendant, Javier, was sentenced to only 366 months, despite admitting to being the shooter. CP 540, 574. This is 168 months—*14 years*—less than Alex's sentence. As the Graham court recognized, a sentencing court should consider the purposes of the SRA when evaluating a mitigated sentence under RCW 9.94A.535(1)(g). Graham, 181 Wn.2d at 886. One of those purposes is to "[b]e commensurate

with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3). If the court imposed concurrent sentences, Alex's sentence would be 267 months plus 120 months for the two mandatory firearm enhancements, for a total of 387 months. CP 225. Thus, even concurrent sentences would still exceed Javier's sentence but, at least, would be considerably more commensurate.

The record establishes the possibility that the trial court would have considered imposing concurrent sentences had it recognized its authority to do so. Under the clear and controlling authority discussed above, this Court should reverse Alex's sentence and remand for resentencing. McFarland, 189 Wn.2d at 59; Mulholland, 161 Wn.2d at 335.

9. **The judgment and sentence erroneously includes discretionary supervision fees.**

At sentencing, the trial court found Alex indigent and expressed its intent to impose only mandatory LFOs: "Only mandatory legal financial obligations will be imposed, but Court

is waiving all nonmandatory fines and costs." 11/19 RP 19-21; CP 222. Despite the court's stated intent to waive all discretionary LFOs, the judgment and sentence ordered, as a condition of Alex's 36-month community custody term, "(7) pay supervision fees as determined by DOC." CP 227. Appendix "F" also ordered: "The offender shall pay community placement fees as determined by DOC." CP 233.

The Washington Supreme Court recently held supervision fees are discretionary LFOs, waivable by the trial court. State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021); see also RCW 10.01.160(3) (prohibiting imposition of discretionary LFOs when trial court finds defendant indigent). The Bowman court concluded a trial court "commit[s] procedural error by imposing a discretionary fee where it had otherwise agreed to waive such fees." 198 Wn.2d at 629. The court ordered supervision fees to be stricken from Bowman's judgment and sentence. Id.

Bowman compels the same result here. The trial court intended to waive all discretionary LFOs. 11/19 RP 19. This

Court should remand for the discretionary supervision fees to be stricken from Alex's judgment and sentence.

10. **Remand for correction of a clerical error in the judgment and sentence is necessary.**

The judgment and sentence states the standard range for Alex's second degree murder conviction, Count 1, is 123 to 223 months. CP 221. But, with Alex's offender score of 0 on that count and a seriousness level of XIV, the correct standard range is 123 to *220* months, not 223 months. CP 221; RCW 9.94A.510. The judgment and sentence therefore states an incorrect standard range. Because the trial court recited the correct standard range at sentencing, this appears to be a clerical error. 11/19 RP 16. Remand for correction of this clerical error is the proper remedy. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

E. CONCLUSION

For the reasons discussed, this Court should reverse Alex's convictions for insufficient evidence and remand for dismissal of

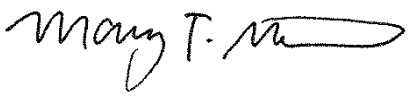
the charges with prejudice. Alternatively, this Court should reverse Alex's convictions because of the multiple trial errors and remand for a new trial. If this Court does not reverse Alex's convictions, then it should remand for an evidentiary hearing on the issue of juror misconduct. Finally, this Court should reverse Alex's sentence and remand for a new sentencing hearing.

DATED this 30th day of September, 2022.

I certify this document contains 21,181 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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